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Some time ago we reported the decision of Judge Taft, of the Cincinnati Superior Court, in the case of Cincinnati Inclined Plane R. R. Co. v. City and Suburban Telegraph Company, involving the question as to the right of a telephone company to enjoin an electric street railway from so using its system of electric overhead wires as to impair the use and value of the telephone service. It will be remembered that Judge Taft granted the injunction, mainly upon the ground that the single trolley system, as used by the electric railway, did in fact cause serious injury to telephone service, claiming that the company should resort to the double trolley system, which, though more expensive, in fact interfered in no degree with the use of telephones. The Supreme Court of Ohio has recently reversed this decision, taking the ground that the dominant purpose for which streets in a municipality are dedicated and opened, is to facilitate public travel and transportation, and in that view, new and improved modes of conveyance by street railways are by law authorized to be constructed, and a franchise granted to a telephone company of constructing and operating its lines along and upon such streets, is subordinate to the rights of the public in the streets for the purpose of travel and transportation. The court contends that the fact that a telephone company acquired and entered upon the exercise of a franchise to erect and maintain its telephone poles and wires upon the streets of a city, prior to the operation of an electric railway thereon, will not give the telephone company, in the use of the streets, a right paramount to the easement of the public to adopt and use the best and most approved mode of travel thereon; and if the operation of the street railway by electricity as the motive power tends to disturb the working of the telephone system, the remedy of the telephone company will be, to re-adjust its methods to meet the condition created by the introduction of electro-motive power upon the street railway.

Where a telephone company, under authority derived from the statute, places its poles and wires in the streets of a municipality and in order to make a complete electric circuit for the transmission of telephonic messages, uses the earth, or what is known as the "ground circuit," for a return current of electricity; and where an electric street railway, afterwards constructed upon the same streets, is operated with the "Single Trolley Overhead System"—so called—of which, the ground circuit is a constituent part, if the use of the ground circuit in the operation of the street railway interferes with telephone communication, the telephone company, as against the street railway, will not have a vested interest and exclusive right in and to the use of the ground circuit as a part of the telephone system.

The delays, in the execution of criminal justice, secured by the abuse of the right of appeal and of the power to grant stays of proceedings in criminal cases, has been recently adverted to and condemned by the New York Court of Appeals in a capital case before them. We lately called attention to the views of the United States Supreme Court upon the same subject in which that court took strong ground against the use of the writ of *habeas corpus*, in federal courts, to obstruct the ordinary administration of the criminal laws of the States. In the New York case referred to, the defendant was convicted over two years ago and nearly a year later the conviction was affirmed on a record presenting not a single exception and disclosing no error on the part of the trial court. On one ground or another the case has been twice before the United States Supreme Court and three times before the New York Court of Appeals, which in now denying a motion for reargument, declares that the proceedings in the case on behalf of the defendant have been discreditable to the administration of justice. The language of the court is strong and unequivocal and should be heeded by practitioners everywhere. They say: "When all the forms of law have been observed and defendant has had every opportunity to make his defense; and his conviction has been affirmed by the highest court of the State, the contest in the courts should end and the final judgment should be exe-

cuted, unless the Governor of the State in the exercise of his clemency, should grant a reprieve or a pardon. The forms of law should not be used to subvert the criminal law of the State. Attorneys and counselors admitted to practice in the courts of this State are under a duty to aid in the administration of justice, and they cannot consistently with this duty engage in vexatious proceedings merely for the purpose of undermining the final judgments of the courts and defeating the behests of the law. It ought to be a subject of inquiry, therefore, whether they can thus become the allies of the criminal classes and the foes of organized society without exposing themselves to the disciplinary powers of the supreme court." Courts are, and should be slow to take any position which can be construed as tending to weaken the safeguards of liberty, but in very many cases their patience becomes exhausted by the schemes and efforts of counsel having in view simply delay, by which much of the deterrent effect of punishment is lost.

NOTES OF RECENT DECISIONS.

LIMITATIONS OF ACTIONS—STATUTE—SUITS ON CHECKS.—The Supreme Court of the United States in Rogers v. Durant, 11 S. C. Rep. 754, construe a statute of the State of Illinois, which provides that "all actions founded upon * * * bills of exchange, orders," etc., "shall be commenced within five years next after the cause of action shall have accrued." The holding of the court is that this section includes checks and that they do not fall within the terms "other evidence of indebtedness in writing," as to which the limitation is fixed, by another section, at sixteen years. Fuller, C. J. says:

Daniel comprehensively defines a "check" to be "a draft or order upon a bank or banking-house, purporting to be drawn upon a deposit of funds, for the payment at all events of a certain sum of money to a certain person therein named, or to him or his order, or to bearer, and payable instantly on demand." 2 Daniel, Neg. Inst. § 1566. And in a note to that section he gives these definitions and descriptions of checks from the text-writers: "A 'check' on a banker is in legal effect, an inland bill of exchange drawn on a banker, and payable to bearer on demand." Byles, Bills, (Sharswood's ed.) 84. "A 'check' is a written order or request addressed to a bank, or to persons carrying on the business of bankers, by a party having money in their hands, requesting them to pay, on presentment, to another person, or to him or bearer, or to him or order, a certain sum of money specified in the instrument." Story, Prom. Notes, § 487. "A check is a brief draft or order on a bank or banking-house, directing it to pay a certain sum of money." 2 Pars. Notes & B. 57. "A check drawn on a bank is a bill of exchange payable on demand." Edw. Bills, 396. The question presented is not one, however, of general commercial law, requiring a discussion of the distinctions existing between checks and bills of exchange, but merely whether checks were intended to be included within the words "bill of exchange," as used in the statute. In Bickford v. Bank, 42 Ill. 238, and Rounds v. Smith, *Id.* 245, it was held that a check might be regarded as substantially an inland bill of exchange, and many authorities were cited to the proposition that the rules applicable to such bills are applicable to checks. But the opinion of the court, by Mr. Justice Breese, did not proceed upon the ground that checks and domestic bills are identical, and the differences between them have been repeatedly recognized by the Illinois courts. Bank v. Ritzinger, 118 Ill. 484, 8 N. E. Rep. 834; Stevens v. Park, 73 Ill. 387; Heartt v. Rhodes, 66 Ill. 351; Willetts v. Paine, 43 Ill. 432; Allen v. Kramer, 2 Ill. App. 205. It has also been decided that an instrument is not less a check because it orders payment "on account of A," (Bank v. Patton, 109 Ill. 479); and that its character as a check is not changed by the fact that it is payable in another State than the one in which it is drawn. National Bank v. Indiana Banking Co., 114 Ill. 483, 2 N. E. Rep. 401; Union Nat. Bank v. Oceana Co. Bank, 80 Ill. 212. And the settled rule in that jurisdiction is that where a depositor draws his check on a banker, who has his funds to an equal or greater amount, it operates to transfer the sum named in the check to the payee, who can sue for and recover the amount from the banker; and that a transfer of the check carries with it the title to the sum named in the check to each successive holder. Brown v. Leckie, 43 Ill. 497; Munn v. Burch, 25 Ill. 35; and cases *supra*. Without pausing to examine the points of resemblance and the points of difference between these instruments, it is enough that the result of the decision in Illinois puts them so far on the same footing as to involve the conclusion that checks were fairly embraced under the description "bills of exchange," in the second section of the statute under consideration. In Moses v. Bank, 34 Md. 574, it was held that checks were embraced within the description "inland bills of exchange," in the article of the Maryland Code relating to protests, and the court said: "According to all the text-writers on bills and notes, as well as in numerous decisions, a 'check' is denominated a species of inland bill of exchange, not with all the incidents of an ordinary bill of exchange, it is true, but still it belongs to that class and character of commercial paper. The same reason, therefore, that would authorize the protest of an inland bill of exchange for non-payment would authorize the protest of a check, the payment of which had been refused on presentment." See, also, Lawson v. Richards, 6 Phila. 179. So in Eyre v. Waller, 5 Hurl. & N. 460, the court of exchequer decided that checks were within the "Summary Procedure on Bills of Exchange Act" (18 & 19 Vict. ch. 67); not only within the mischief, but within the words of the act. And, while these cases are referred to by way of illustration merely, it seems to us clear that, whatever the legislative reason for the discrimination between the subjects of the first and of the second section, that reason manifestly requires checks to be placed in the same category as bills of exchange. Again, we are of opinion that checks might properly be held comprised in the word "or-

ders," as associated with bills of exchange rather than otherwise.

EJECTMENT — MUNICIPAL CORPORATION — BUILDING SEWER.—In Harrington v. City of Port Huron, 48 N. W. Rep. 641, the Supreme Court of Michigan decide that where a city erected upon government land, without permission, a sewer, together with a structure of masonry at its outlet, extending partly into an adjoining river, a subsequent owner of the land cannot maintain ejectment against the city, when the latter has built no fences about the property, and is exercising over it no acts of ownership or control. Morse, J., dissented from the conclusion of the court in the following language:

It is true, under the authorities, that ejectment cannot be maintained for a mere trespass upon land, nor for a mere right of way or an easement; but that is not this case. This occupation of the city for the purpose of sewerage is not a mere temporary trespass, like one going onto the premises of another and doing damage and going away again, but it is a continuing trespass—one that never ceases. The sewer remains there all the time, and is in use by the city night and day. It amounts substantially to a constant occupation of the plaintiff's premises, and a possession which is sufficient to justify the remedy of ejectment. Ejectment, under our statute will lie against any "person exercising acts of ownership on the premises claimed, or claiming title thereto, or some interest therein." How. St. § 7791. In Cole v. Wells, 49 Mich. 450, 13 N. W. Rep. 813, the defendant fastened a boom-pole to piles driven in the Black river in front of plaintiff's land, and used the boom for the storage of logs, claiming the right to do so. It was held that ejectment could be maintained. There was nothing in that case to prevent the plaintiff from tearing away and removing this boom from his premises. He could have destroyed it, as he can destroy this sewer; but the law, in my opinion, does not force the plaintiff to destroy property to remove such an obstruction, or to get, as he probably would, into a war or conflict over the possession of the premises so occupied by another, in which conflict the superior force would prevail. He is entitled to the peaceful remedy of ejectment. Nor is he even compelled to resort to the inadequate and vexatious remedy of trespass—a remedy which, in case of judgment in his favor, settles nothing as to his title to the land. Keyser v. Sutherland, 59 Mich. 455, 26 N. W. Rep. 865. But it is said that there has been and is nothing in the way of his taking peaceful possession of the land. But this is no valid reason why he cannot bring ejectment under our statute. We have held repeatedly that the putting on the record of a tax-deed to premises and claiming title thereunder would warrant an action of ejectment by the owner of the land out of possession against the holder of such tax-title. Heinmiller v. Hatheway, 60 Mich. 591, 27 N. W. Rep. 558; Anderson v. Courtright, 47 Mich. 161, 10 N. W. Rep. 183; Hoyt v. Southard, 58 Mich. 434, 25 N. W. Rep. 385. Yet in such case there would be nothing to prevent the owner obtaining peaceable possession of the premises in most cases, but it has never been claimed that the fact that such possession could be taken had anything to do with the right to bring ejectment. Possession in the defendant is not a necessary element in ejectment in this State. The remedy is aimed against the assertion of ownership of or an interest in the land as well as against an unlawful possession. Nor are the cases cited by the chief justice in relation to easements or rights of way applicable here. The plaintiff is not bringing ejectment to recover a right of way or an easement, but to free his land of an unauthorized occupation under a claim of right by the city to so occupy it. As before shown, he is not obliged to invite trouble and conflict in an attempt to free his premises by removing the piles and tearing out the sewer. The action of trespass would not settle his title. He is not obliged to forbear his remedy in ejectment—the only proper action to declare and fix his title permanently—because the premises are not guarded against his peaceable entry upon them. See Carpenter v. Railway Co., 24 N. Y. 656.

WATER-RIGHTS—PRIOR APPROPRIATION — TRANSFER OF RIGHT — COMPENSATION.— The question in the case of Strickler v. City of Colorado Springs, 26 Pac. Rep. 313, decided by the Supreme Court of Colorado, is of interest on the subject of water-rights. It is there laid down that the fundamental principle of our system of water-rights is that priority in point of time gives superiority of right among appropriators for like beneficial purposes. The rights of a prior appropriator from a stream cannot be impaired by subsequent appropriations of water from its tributaries. A prior appropriator of water from a stream may change the point of diversion and the place of use without losing its priority, provided the rights of others are not injuriously affected by such change. A priority to the use of water for irrigation is a property right, and may be sold and transferred separately from the land in connection with which the right ripened. Rights acquired to the use of water for irrigation, prior to the adoption of our State constitution, cannot be taken by a city for the domestic use of its inhabitants, without compensation. Upon the principal question the court says:

The authorities seem to concur in the conclusion that the priority to the use of water is a property right. To limit its transfer, as contended by appellee, would in many instances destroy much of its value. It may happen that the soil for which the original appropriation was made has been washed away and lost to the owner, as the result of a freshet or otherwise. To say, under such circumstances, that he could not sell the water right to be used upon other land would be to deprive him of all benefit from such right. We grant that the water itself is the property of the public. Its use, however, is subject to appropriation, and in this case it is conceded that the owner has the paramount right to such use. In our opinion this right may be transferred by sale so long as the rights of others, as in this case, are not injuriously affected

thereby. If the priority to the use of water for agricultural purposes, is a right of property, then the right to sell it is as essential and sacred as the right to possess and use. Blackstone says: "The third absolute right inherent in every Englishman is that of property, which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land." 1 Bl. Comm. p. 138. What difference can it make to others whether the owner of the priority in this case uses it upon his own land, or sells it to others to be used upon other lands? There is no claim of waste occurring between the present points of diversion and the place where the city is to take the water. Where a material waste results from the change, a new feature is introduced which need not be considered here. In chapter 5 of Angell on Water-courses, a number of instances are cited where at common law water-rights were declared to be the subject of sale, and although with us such rights are acquired by appropriation rather than by grant or prescription, as at common law, this certainly cannot affect the right of alienation. In Hurd v. Curtis, 7 Metc. (Mass.) 94, several owners of mill privileges had apportioned the water among themselves by a written agreement. By the terms of this instrument one W, the owner of a fulling-mill, was entitled to a certain portion of the water for the use of his mill, "or for other machinery requiring equal power;" and it was held that the water-right was not inseparably connected with the building or site at which the water was then used, but that it might be used elsewhere. In De Witt v. Harvey, 4 Gray, 486, a deed had been given of land bordering on a canal supplying mills, "with the privilege of crossing to and from and around the same, and of erecting and using tenter-bars in some convenient place near the same, with the privilege also of drawing water from said canal at all times when it may be done without injury to the said mills, sufficient for the purpose of a fulling-mill and shearing-machine, but for no other purposes whatever." And it was held that the right to use the water for a fulling-mill and shearing-machine is not made appurtenant to the land grant, and also that such right was not extinguished by the dam being subsequently taken down by the owners of water-power at that spot, and rebuilt in such a manner as to overflow the land granted by the deed; the court being of opinion that the rights of water were not appurtenant to the particular parcel of land granted, but that the owner might use the water at any place, or in any manner, so long as the rights of others were not thereby impaired. When, therefore, the land became submerged, it was held that the right of the owner to use the water at any other mill, or upon any other parcel of land situated on the same dam, should be sustained. There is no controversy in the present case in reference to the mode and manner in which the right to the water may be conveyed, the contention extending further back; the claim being that the right cannot be conveyed at all, except with the land. The claim is not well founded. As we have seen, the right is the subject of property, and may be transferred accordingly; the sole limitation being that the rights of others shall not be injuriously affected by such transfer.

CRIMINAL PRACTICE—LARCENY—INFORMATION—DUPLICITY.—The Supreme Court of Indiana, in Joslyn v. State, 27 N. E. Rep. 492, say that an information which charges in one count that the defendant stole an article belonging to one man, and an article belonging to another man, without alleging that the two articles were stolen at the same time, and by the same act, is bad for duplicity. Elliott, J., says:

It is well known that every larcenous taking is a trespass against the owner. An essential element of the crime of larceny is trespass, although the trespass may be constructive, and not actual. Assuming, as we must, that the element of trespass is essential to the crime of larceny, we must ascertain what the implication is, where it is charged that there was a trespass against two or more persons. It seems clear to us that the implication is that the trespasses were separate and distinct. If Gunnison had sued the appellant for the trespass, and had alleged that the appellant carried away his (Gunnison's) property, and that of Parham also, we suppose it to be plain that Gunnison could not recover the value of Parham's property; for the implication would be that there were distinct causes of action. If this is the implication, then the information is double. We can perceive no escape from this conclusion. We cannot infer, for the sake of upholding a conviction of a crime, that what would ordinarily be regarded as two distinct trespasses is, in fact only one. The authorities require the conclusion we have suggested. In the case of Phillips v. State, 85 Tenn. 551, 3 S. W. Rep. 434, the goods belonged to different persons, but were taken on the same night from the same room, and it was held that there were two distinct offenses. In speaking of the trespass to the different owners, it was said: "The wrong to one of them was no wrong to the other, and, if the wrong to each was not a complete crime within itself, there is no wrong at all, because two acts involving the distinct rights and property of different individuals cannot be coupled in order to constitute one offense against the law." Possibly the language used is a little to broad, but restricting it to due bounds, nevertheless the principle declared decides the case against the State. Suppose, for the sake of illustration, that the appellant had been convicted of stealing Gunnison's property, and was subsequently indicted for stealing Parham's property, would the conviction be *prima facie* a bar to the second prosecution? To our minds it is clear that it would not be, although it is possible that, if it appeared that the property of both owners was taken in a single and indivisible act, the first conviction would bar further prosecution. If the first prosecution would not be a bar, and we think it would not be, it must be for the reason that *prima facie* there are two offenses. Resuming our consideration of the authorites, we quote from the case of Morton v. State, 1 Lea, 498, the following: "Every larceny includes a trespass to the person or property of the owner of the thing stolen. A larceny of the property of O'Brien was no trespass to the person or property of Corbitt, and *vice versa*." In the case of State v. Thurston, 2 McMul. 382, it was held that taking cotton belonging to three persons constitutes three distinct offenses. The doctrine is carried much further, possibly too far, in Commonwealth v. Andrews, 2 Mass. 409, for it was there held that the offenses were distinct, although there was a single act. But well-reasoned cases in California go to the same length. People v. Alibez, 49 Cal. 452; People v. Majors, 65 Cal. 138, 3 Pac. Rep. 597; People v. Yoakum, 53 Cal. 570.

The common-law rule, as stated in State v. Nelson, 8 N. H. 163, is this: "If one steal at the same time the goods of A, and also other goods of B, there are two distinct larcenies. East, P. C. 521." Some of the cases say that the rule is that "the plea of *autrefois acquit* or *convict* is sufficient whenever the transaction is the same." Copenhaven v. State, 14 Ga. 8; Holt v. State, 38 Ga. 187. Without going into an examination of the decisions of other courts in detail, we cite, as sustaining the doctrine that unless the transaction is indivisible and the same the offenses are distinct. Vaughan v. Com., 2 Va. Cas. 273; Teat v. State, 53 Miss. 439; Burns v. People, 1 Parker Crim. R. 182; People v. Saunders, 4 Parker Crim. R. 196; Reg. v. Morris, 10 Cox, Crim. Cas. 480. It is difficult to reconcile the doctrine of our later cases with that asserted in Clem v. State, *supra;* but it is not important that we should attempt to do so in this instance; nor is it necessary to determine which is the better doctrine; for, assuming that the doctrine of Clem v. State is sound, it in no wise impeaches our conclusion; for it is there held that the crime must be the product of one and the same act, and conceding this, the information is bad. In the case of State v. Elder, 65 Ind. 282, it was said: "When the same facts constitute two or more offenses, wherein the lesser offense is not necessarily included in the greater, and when the facts necessary to convict in the second would not necessarily have convicted in the first, then the first prosecution will not be a bar to the second, although the offenses were both committed at the same time and by the same act." Much to the same effect is the reasoning in State v. Hattabough, 66 Ind. 223, and Siebert v. State, 95 Ind. 471-480. See, also, Davidson v. State, 99 Ind. 366. We know that there are decisions hostile to the conclusion we here assert; but we are satisfied that our conclusion is right on principle, and sustained by the decided weight of authority.

FORFEITURE OF MEMBERSHIP IN BENEFIT SOCIETIES FOR NON-PAYMENT OF CONTRIBUTIONS AND DUES.

II.

14. Excuses for Non-payment of Assessments—War.
15. Excuses for Non-payment of Assessments—When the Company is the Assured's Debtor.
16. Excuses for Non-payment of Assessments—Act of God.
17. Waiver and Estoppel.

14. *Excuses for Non-Payment of Assessments—War.* — Notwithstanding failure to pay caused by the intervention of war between the territories in which the company and assured respectively reside, which makes it unlawful for them to hold intercourse, the policy is nevertheless forfeited if the company insists on the condition; but in such case, the assured is entitled to the equitable value of the policy arising from premiums actually paid. This conclusion proceeds upon the ground that a life policy stipulating for annual premiums, with a condition voiding the policy on non-payment, is not an insurance from year to year, like a common fire policy, but the premiums constitute an annuity, the whole of which is the consideration for the entire assurance for life; and the condition is a condition subsequent, making the policy void by its non-payment. The time of payment is material, and of the essence of the contract; and a failure to pay involves an absolute forfeiture, which cannot be relieved against in equity.[1] On the other hand, it has been held that a failure to pay, by reason of the intervention of war, does not avoid the policy.[2]

15. *Excuses for Non-Payment of Assessments—When the Company is the Assured's Debtor.*—Where a mutual company has in its possession dividends belonging to a policyholder in amount more than sufficient to pay an accruing premium when it falls due, the company has the right, and is bound, if the premium is not paid to make such an appropriation, and cannot declare the policy forfeited, especially where it had long been the custom of applying such dividends to the payment of premiums.[3] But where the company holds profits earned but not declared as dividends or otherwise, such profits cannot be treated as funds in the company's hands applicable to the payment of premiums.[4] So it is no excuse for non-payment that the company owes the assured a less sum than required to cover the premium,

[1] N. Y. Life Ins. Co. v. Statham, 93 U. S. 24; Insurance Co. v. Davis, 95 U. S. 425; Tait v. N. Y. Life Ins. Co., 1 Fil. 288; 2 Ins. L. J. 863; 4 Big. Life & Acc't Ins. Cas. 479; Worthington v. Charter Oak Ins. Co., 41 Conn. 382; Dillard v. Manhattan, etc. Ins. Co., 44 Ga. 119; Bird v. Penn. Mut. Life Ins. Co., 11 Phila. 485; 2 W. N. C. 410; Hancock v. N. Y. Life Ins. Co., 13 Am. L. Reg. (N. S.) 103; Abell v. Penn. Mut. Life Ins. Co., 18 W. Va. 400; O'Reilly v. Mut. Life Ins. Co., 2 Abb. Pr. (N. S.) 167.

[2] Cohen v. N. Y. Life Ins. Co., 50 N. Y. 610; Sands v. N. Y. Life Ins. Co., 59 Barb. 557, 50 N. Y. 626; Mut. Ben. Life Ins. Co. v. Hillayard, 37 N. J. L. 444; Clemmitt v. N. Y. Life Ins. Co., 76 Va. 355; Statham v. N. Y. Life Ins. Co., 45 Miss. 581. See May on Insurance, §§ 350, 350*a*; article in 11 Am. Law Rev. 221.

[3] Girard Life Ins. Co. v. Mut. Life Ins. Co., 97 Pa. St. 15; Franklin Life Ins. Co. v. Wallace, 98 Ind. 7; Hull v. N. W. M. Life Ins. Co., 39 Wis. 397; Manhattan Life Ins. Co. v. Hoelzle, 8 Ins. L. J. 226; Ohde v. N. W. Life Ins. Co., 40 Iowa, 357; Dutcher v. Brooklyn Life Ins. Co., 3 Dillon, 87; Insurance Co. v. Dutcher, 95 U. S. 269; Butler v. Am. Popular Life Ins. Co., 10 Jones & Sp. (N. Y.) 342.

[4] Mutual Life Ins. Co. v. Girard Life Ins. Co., 101 Pa. St. 172, 179.

unless he offers to pay the balance.[5] In the case of an order which conferred both sick and death benefits, the subordinate lodge owed the suspended member a sufficient amount on account of sick benefits to cover the unpaid assessment, the omission to pay which within the prescribed time resulted in the suspension. In a suit on the benefit certificate, the beneficiary contended that the sum due the deceased on account of sickness should have been applied by the lodge to pay the assessment without specific direction of the deceased, but the court refused to sustain this position, holding that there was no connection between assessments and dues; that the latter were subject to the exclusive control of the subordinate lodge which if paid according to regulations entitled the members to such benefits, while assessments were entirely controlled by the superior body and by the payment of which promptly entitled the member's beneficiary to share in the benefit fund.[6]

16. *Excuses for the Non-Payment of Assessments—Act of God.*—Acts of God, such as insanity or sudden illness, which render the assured delirious, are not recognized as legal excuses so as to relieve or excuse payment of premiums when they fall due. This is a well established rule in the law of insurance,[7] and it applies with equal force to benefit societies.[8] The reason of the rule is obvious. Inevitable visitations are not accepted in law as excuses for the failure to perform contracts and conditions in all cases indiscriminately. When the contract or condition requires personal service which can be rendered or performed only by the party personally, inevitable accident or the act of Omnipotent Power will excuse a failure of performance.[9] But where a party absolutely assumes the performance of a feasible and lawful contract or condition, which may be executed or discharged by another, then no unforseen contingencies will relieve him from the consequences of an omission of performances.[10] These principles have been deduced from a long and continuous line of authorities, and have received frequent recognition and application by the highest courts.[11] However, where there is an agreement to the effect that if any thing should happen to prevent payment of the premium on the day specified, the policy should not thereby become void, and payment has been prevented by an act of God, such as sudden sickness, rendering the assured unconscious, if payment is made within a reasonable time thereafter, it will be sufficient, although the assured dies before the day of tender.[12] So where the rule is that in case of default if valid reasons are presented, the defaulting member may be reinstated upon paying assessment arrearages, and the member is stricken with apoplexy and thus prevented from paying within the time limited, in the absence of the requirement of good health as a condition to reinstatement, in an action on the policy by the assignee of the assured, the sufficiency of the excuse is a question of fact for the jury.[13] But under a similar rule in a Maryland case it was held that sickness rendering the assured delirious was not a satisfactory excuse. It does not appear from the opinion whether good health was made a condition to reinstatement. If this was a requirement by the rules of the association, the decision rests upon correct principles, and is in harmony with the last case; otherwise not.[14] The rules of some societies provide that failure to receive notice may be regarded as a valid excuse, but when this is relied on, the burden of proving it rests upon the party offering it.[15]

17. *Waiver and Estoppel.*—The time of payment of premiums or assessments may be extended by agreement,[16] or it may be

[5] Hollister v. Quincy Mut., etc. Co., 118 Mass. 478.

[6] A. O. U. W. v. Moore (Ky.), 9 Ins. L. J. 539. See strong dissenting opinion by Pryor, C. J.

[7] Klein v. Insurance Co., 104 U. S. 88; Thompson v. Insurance Co., 104 U. S. 252; Wheeler v. Life Ins. Co., 82 N. Y. 543, 16 Hun, 317; Howell v. Life Ins. Co., 44 N. Y. 276; Attorney-General v. N. A., etc. Co., 82 N. Y. 190; Hillayard v. Mutual, etc. Co., 35 N. J. L. 415; Carpenter v. Centennial Mut., etc. Ass'n, 68 Iowa, 453, 27 N. W. Rep. 456.

[8] Hawkshaw v. Supreme Lodge Knights of Honor, 29 Fed. Rep. 770; Yoe v. Howard, etc. Ass'n, 63 Md. 86; 6 Am. & Eng. Corp. Cas. 641.

[9] Wolfe v. Hanes, 20 N. Y. 197.

[10] Dexter v. Norton, 47 N. Y. 62.

[11] Dennis v. Mass. Ben. Ass'n, 14 N. Y. State Rep. 605.

[12] Howell v. Knickerbocker Life Ins. Co., 44 N. Y. 276.

[13] Dennis v. Mass. Ben. Ass'n, 47 Hun, 338; Wheeler v. Mutual Life Ins. Co., 82 N. Y. 543.

[14] Yoe v. Harvard, etc. Ass'n, 63 Md. 86, 6 Am. & Eng. Corp. Cas. 641.

[15] Eaton v. Supreme Lodge Knights of Honor (U. S. C. C.), 22 Cent. L. J. 560.

[16] Dean v. Ætna Life Ins. Co., 62 N. Y. 642; Bodine v. L., etc. Co., 51 N. Y. 117; Palmer v. Phœnix, etc. Co., 84 N. Y. 63.

waived by certain acts or omissions on the part of the company or society. The extension by agreement may be by parol and evidence to prove it is admissible.[17] Evidence that the company, by previous transactions with the plaintiff and others, had extended the time of payment, would warrant a jury in concluding that the defendant was estopped from denying an agreement for extension, and insisting upon a forfeiture.[18] But where a policy becomes void by reason of a violation of a condition other than the non-payment of the premium, a mere promise made thereafter, without consideration, to continue such policy upon the payment of additional premiums which are thereafter tendered to, but not accepted by the company will not be enforced.[19] It is a rule of universal application that, where the practice of the company and its course of dealings with the assured, and others known to the assured have been such as to induce a belief that that part of the contract which provides for a forfeiture in case of non-payment of premiums or assessments within the time specified will not be enforced, the company will not be allowed to claim such forfeiture as against one in whom its conduct has induced such belief.[20] Conditions for the benefit of the company may always be waived before loss;[21] but more persuasive evidence should be required to justify a finding of a waiver after a loss occurs, yet notwithstanding a waiver may take place.[22] Continuing the policy in force and accepting payments of premiums thereon after they are due, with a full knowledge of the facts, will be held to constitute a waiver.[23] These rules are applied with equal force to benefit societies.[24] Estoppel is the true ground upon which the doctrine of waiver in these cases rests.[25] In other words, the doctrine of waiver, as here applied, is only another name for estoppel. It can only be invoked where the conduct of the company has been such as to induce action in reliance upon it, and where it would operate as a fraud upon the assured if the company was afterwards allowed to disaffirm its conduct and enforce the conditions. To a just application of this doctrine it is essential that the company sought to be estopped from denying the waiver claimed should be apprised of all the facts: of those which create the forfeiture, and of those which will necessarily influence its judgment in consenting to waive it.[26] Hence, a company will not be held to be estopped from claiming a forfeiture where it accepts a premium after the death of the insured where the company is ignorant of such death.[27] As we have already seen, forfeitures are not favored, either in law or in equity, and a provision providing for them in a contract will be strictly construed, and courts will find a waiver on slight evidence where the equity of the claim made under the contract is in favor of the assured.[28] Courts

[17] Sheldon v. Connecticut Mut., etc. Co., 25 Conn. 207; Dilleber v. Knickerbock Life Ins. Co., 76 N. Y. 567.

[18] McCraw v. Old North State Ins. Co., 78 N. C. 147.

[19] Evans v. U. S. Life Ins. Co., 3 Hun, 587.

[20] Nat. Mut. Aid, etc. Ass'n, v. Jones, 84 Ky. 110; Gunther v. N. O., etc. Ass'n (La.), 5 South. Rep. 65; 18 Ins. L. J. 112; Winindger v. Globe Mut., etc., 3 Hughes (U. S. C. C.), 257; Ruse v. Mut. Ben. Ass'n, 26 Barb. 556; Johnson v. Southern Mut., etc., 79 Ky. 403; Chicago Life Ins. Co. v. Warner, 80 Ill. 410; Insurance Co. v. Eggleston, 96 U. S. 572; Insurance Co. v. French, 30 Ohio St. 240; Helme v. Insurance Co., 61 Pa. St. 107; Stylow v. Insurance Co., 69 Wis. 224, 34 N. W. Rep. 151; Appleton v. Insurance Co., 59 N. H. 541; Insurance Co. v. Anderson, 77 Ill. 384; Hawley v. Association, 69 Mo. 380; Insurance Co. v. Amerman, 119 Ill. 329, 10 N. E. Rep. 225; Home Protection, etc v. Avery (Ala.), 5 South. Rep. 143; Morrison v. Wisconsin Odd Fellows, etc., 59 Wis. 162; Davidson v. Old Peoples' M. B. Soc., 39 Minn. 303, 39 N. W. Rep. 803; Bosworth v. Western Mut. Aid Soc. (Iowa), 39 N. W. Rep. 903; Lewis v. Phœnix Mut. Life, etc., 44 Conn. 72; Mutual Life, etc. v. Raddin, 120 U. S. 183, 7 Sup. Ct. Rep. 500; Phœnix Mut. Life, etc. v. Hinesley, 75 Ind. 1; Watson v. Continental Mut., etc., 21 Fed. Rep. 698; Schwarzback v. Ohio Valley P. Union, 25 W. Va. 622, 666; McCraw v. Old North State Ins. Co., 78 N. C. 149; Ferebee v. N. C. Home Ins. Co., 68 N. C. 11.

[21] Sims v. State Ins. Co., 47 Mo. 54; Froelick v. Atlas Ins. Co., 47 Mo. 406; Baldwin v. Chouteau Ins. Co., 56 Mo. 156; Schmidt v. Charter Oak Ins. Co., 2 Mo. 339.

[22] Farmers' Ins. Co. v. Bourn, 40 Mich. 147; Smith v. St. Paul, etc. Co., 13 N. W. Rep. 355; Phœnix Ins. Co. v. Lansing, 20 N. W. Rep. 22; McCluer v. Home Ins. Co., 31 Mo. App. 62; Williams v. Insurance Co., 19 Mich. 451; Joliffe v. Insurance Co., 39 Wis. 111.

[23] Froehlick v. Atlas Life Ins. Co., 47 Mo. 406; Sims v. State, 47 Mo. 54; Thompson v. Mut., etc. Co., 52 Mo. 469; Teutonia Life Ins. Co. v. Anderson, 77 Ill. 384; Haven v. Insurance Co., 111 Ind. 90, 12 N. E. Rep. 137; Phœnix Ins. Co. v. Lansing, 15 Neb. 494.

[24] McDonald v. Order of Chosen Friends (Cal.), 20 Pac. Rep. 43; Yoe v. Howard, etc. Ass'n, 63 Md. 86; 6 Am. & Eng. Corp. Cas. 641.

[25] Elliott v. Lycoming County Mut. Ins. Co., 66 Pa. St. 22, 26.

[26] Insurance Co. v. Wolff, 95 U. S. 326, 333.

[27] Mobile Life Ins. Co. v. Pruett, 74 Ala. 487; Miller v. Union Central, etc. Co., 110 Ill. 102; Robertson v. Metropolitan, etc. Co., 88 N. Y. 541; Harris v. Equitable, etc., Ass'n, 64 N. Y. 196.

[28] Lyon v. Travelers' Ins. Co., 55 Mich. 141, 146;

are always prompt to seize hold of any circumstance that indicates an election to waive a forfeiture.[29] Where the practice of the company is such as to induce a belief that a forfeiture will be waived by receiving overdue premiums, a letter sent out with the following words printed thereon: "every policy is non-forfeiting," the company will be estopped from insisting upon a forfeiture on the ground that a subsequent premium was not paid on the day specified.[30] So indorsing upon a card, giving notice of a day when a payment would fall due, "payment extended," has the same effect.[31] Overdue premiums or assessments may be received conditionally without raising an estoppel. Thus, where the receipt of the premium is on the express condition that the member is alive and in good health at the date of the receipt, the company will not be bound unless the member is alive and in good health.[32] However, in one case, the receipt on the certificate recited: "Received on condition that the member is in good health." Nothing was said about, nor was there any inquiry, as to the member's health. The company subsequently levied six assessments and unconditionally accepted them. The company was held to be estopped from setting up the forfeiture, although it appeared that the member was at the date of the conditional acceptance in bad health.[33] In one case the member relied upon the promise of the manager to draw upon him for assessments and was misled by the fact that such draft had been twice made upon him. He was suspended and could not be reinstated by reason of impairment of health. The association was held to be estopped from insisting upon the forfeiture.[34] In another, the member had become a delinquent. He transmitted to the company money in payment of all dues then demanded of him, but the amount was insufficient; however, it was retained by the company until after the member's death without any notice to the member as to the insufficiency of the amount. Such facts were held to constitute a waiver.[35] Where membership is made to depend upon the continuance of membership in a particular organization, withdrawing membership from such organization forfeits all rights in the society, and the subsequent levy and collection of assessments by the society does not estop it from denying membership;[36] especially where the society had no knowledge of lapse of membership in the former organization.[37] Where fraud exists there can be no waiver or estoppel.[38] Waiver or estoppel is a question to be determined upon the facts of each particular case. Occasionally accepting assessments after they are due is held not to constitute a waiver.[39] But it has been held that making a new assessment while the member is in default in a former assessment waives the right to claim a forfeiture for the first assessment.[40] However, the contrary has also been held.[41] Where a member forfeits his membership by failure to pay assessments, notice of which was mailed, but possibly not received, it was held that demand, receipt and retention by the company of subsequent assessments constituted a waiver of the forfeiture, even though no waiver was intended by the company.[42] "It is not the intention of the insurer, but the effect upon the insured which gives vitality to the estoppel."[43] Where the provision is

Young v. Life Ins. Co., 4 Big. L. & Acc't Cas. 1; Miller v. Brooklyn Ins. Co., 2 Big. L. & Acc't Cas. 35; Bouton v. Am. M. L. Ins. Co., 25 Conn. 542; Phœnix Ins. Co v. Lansing, 15 Neb. 494; Crane v. Dwyer, 9 Mich. 350; Westchester Fire Ins. Co. v. Earle, 33 Mich. 143; Ripley v. Ætna Ins. Co., 29 Barb. 557; Pulford v. Fire Department, 31 Mich. 458.

[29] Insurance Co. v. Eggleston, 96 U. S. 572; Insurance Co. v. Norton, 96 U. S. 234.

[30] Home Life Ins. Co. v. Pierce, 75 Ill. 426.

[31] Homer v. Guardians' Mut. Life Ins. Co., 67 N. Y. 478. The fact that the insurer retains the policy as bailee of the insured does not constitute a waiver of the due payment of premiums. Howard v. Mut. Ben. L. Ins. Co., 6 Mo. App. 577.

[32] Unsell v. Hartford Life, etc. Co., 32 Fed. Rep. 443; Sarvoss v. Western Mut. Aid Soc., 67 Iowa, 86.

[33] Rice v. New England, etc. Society, 146 Mass. 248, 17 Ins. L. J. 615, 15 N. E. Rep. 624.

[34] McCorkle v. Texas Ben. Ass'n, 71 Tex. 149, 8 S. W. Rep. 516.

[35] Georgia Mut. Life Ins. Co. v. Gibson, 52 Ga. 640.

[36] Burbank v. Boston Police Relief Ass'n, 144 Mass. 434.

[37] Springnuer v. Ben. Ass'n, etc., 5 W. L. Bull (Ohio), 516.

[38] Harris v. Equitable Ass'n Soc., 64 N. Y. 296; Davidson v. Young, 38 Ill. 145, 182.

[39] Marston v. Mass. Life Ins. Co., 59 N. H. 92; Niblack on Mut. Ben. Soc., § 326.

[40] Stylow v. Wisconsin, etc. Co., 69 Wis. 224, 19 Am. & Eng. Corp. Cas. 33.

[41] Crawford County, etc. Co. v. Cochran, 88 Pa. St. 230; Mut. P. Life, etc. Co. v. Laury, 84 Pa. St. 43.

[42] Tobin v. Western Mut. Aid Soc., 72 Iowa, 261, 33 N. W. Rep. 663. To same effect, see Bailer v. Mut. Ben. Ass'n, 71 Iowa, 689, 27 N. W. Rep. 720; Farmers' Mut., etc. Co. v. Bowen, 40 Mich. 147.

[43] May on Insurance, § 507.

that the policy shall be void if the premium is not paid within ten days after notice, and it appears that it was the habit of the association to receive payment from the assured, if made within sixty days from the date of the notice, and the certificate remained uncanceled at the death of the assured, it was held that the company was estopped from claiming forfeiture.[44] Where a member has paid sixteen premiums during the time of his membership, seven of which are paid from three to fourteen days subsequent to the time specified, and the last of which is paid fourteen days thereafter, the company is estopped from insisting upon a forfeiture.[45] But where the practice of the company is not to accept overdue payments without full inquiry into the assured's health the company may properly refuse an overdue premium when the assured is in bad health.[46] The question of waiver is sometimes to be submitted to the jury;[47] however, this should not be done if there is but a mere spark of evidence upon which to base it.[48] In a recent Illinois case, defendant was a voluntary beneficial association composed of subordinate lodges. The constitution for the government of subordinate lodges provided that the manner of suspensions for the non-payment of dues and assessments should be detailed in the by-laws of every lodge. The subordinate lodge of which deceased was a member had never adopted a suspension by-law, but it claimed the right to suspend on the ground of custom. The court declared the suspension illegal; that the constitutional provision was imperative, requiring the lodge to adopt a uniform rule respecting the subject of suspension, and, in the absence of which, the power to pronounce a sentence of suspension could not be exercised. The court also held that the right to suspend on the ground of custom could only be exercised, if it could be exercised at all (which the court denied in the case at bar), where it had been well established, certain, uniform, and operated upon all members alike.[49]

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[44] Odd Fellows' Mut. Aid Ass'n v. Sweetser (Md.), 19 N. E. Rep. 722.

[45] Cotton State Life Ins. Co. v. Lester, 62 Ga. 247. See Alabama Gold Life Ins. Co. v. Garmany, 74 Ga. 51; Appleton v. Phœnix Mut. Life Ins. Co., 59 N. H. 541; Thompson v. St. Louis Mut. Ins. Co., 52 Mo. 469, 2 Ins. L. J. 422; Hodsdon v. Guardians' Life Ins. Co., 97 Mass. 144; Currier v. Continental Life Ins. Co., 53 N. H. 538; Heaton v. Manhattan Fire Ins. Co., 7 R. I. 502; Hoffman v. Supreme Council American Legion of Honor, 35 Cal. 252; 2 Herman on Estoppel, § 1214; Buckbee v. U. S. Ins. Co., 18 Barb. (N. Y.) 541; Stylow v. Association, 69 Wis. 224, 19 Am. & Eng. Corp. Cas. 33.

[46] Mut. Life Ins. Co. v. Girard Life Ins. Co., 100 Pa. St. 172: Nat. Mut. B. Ass'n v. Miller, 85 Ky. 88, 2 S. W. Rep. 900; Crossman v. Mass. Ben. Ass'n, 143 Mass. 435, 9 N. E. Rep. 753.

[47] Odd Fellows', etc. Ass'n v. Sweetser (Ind.), 19 N. E. Rep. 722; Crawford County, etc. Co. v. Cochran, 88 Pa. St. 230; Mut. Ins. Co. v. French, 30 Ohio St. 240; United Brethren, etc. Society v. Schwartz (Pa.), 13 Atl. Rep. 769.

[48] Elliott v. Lycoming, etc. Co., 66 Pa. St. 22, 26.

[49] District Grand Lodge, etc. v. Cohn, 20 Ill. App. (Bradwell) 335.

HIGHWAY—STREET RAILWAY—NUISANCE—INJUNCTION.

VAN HORNE V. NEWARK PASS. RY. CO.

Court of Chancery of New Jersey, June 1, 1891.

1. *Highway—Additional Burden—Street Railway is Not.*—A horse-railway in a public street is not an additional servitude, even though the abutter owns the fee to the center of the highway.

2. *Street Railway—Nuisance—Injunction.*—Where a horse-railway is laid in a highway without authority, it is a public nuisance, but injunction will not lie at the suit of an abutting land owner who suffers no special injury.

MCGILL, Ch.: The complainant, who is the owner of a lot of land abutting on Main street, in the City of Orange, seeks, by injunction, to restrain the defendant from extending its horse-railway through Main street, in front of his land. He insists that he is the owner of the fee of the land in Main street, in front of and adjoining his lot, to the center of the highway; that the defendant is without legislative authority to construct and operate the railway in that street; and that the construction and operation of such railway, over his land in the street, will be an invasion of his property rights which this court will stay by injunction. The defendant does not deny the complainant's ownership of the fee of the land in question, but disputes the insistment that it has not sufficient legislative authority to extend its railway as proposed, and denies that this court will interfere by injunction, even if it should conclude that no authority to extend the railway exists. The conclusion I have reached precludes the necessity of examining the question as to the defendant's authority to extend its road. I will assume, for my present purpose, that it does not possess such authority. The complainant's right to the land in the street is best described in the language of Mr. Justice Depue in his opinion in the case of Improvement Co. v. Hoboken, 36 N. J. Law, 540, in the court of errors and appeals,

where he says: "With respect to lands over which streets have been laid, the ownership, for all substantial purposes, is in the public. Nothing remains in the original proprietor but the naked fee, which, on the assertion of the public right, is divested of all beneficial interest." In Halsey v. Railway Co. (N. J.), 20 Atl. Rep. 859, Vice-Chancellor Van Fleet said: "Lands taken for streets are taken for all time, and, if taken upon compensation, compensation is made to the owner once for all. His compensation is awarded upon the basis that he is to be deprived perpetually of his lands. The lands are acquired for the purpose of providing a means of free passage, common to all the people, and consequently may be rightfully used in any way that will subserve that purpose. By the taking the public acquire a right of free passage over every part of the land, not only by the means in use when the lands were taken, but by such other means as the improvements of age and new wants arising out of an increase in population or an enlargement of business may render necessary." It is subject to the servitude thus described that the complainant owns the land now about to be invaded. In Railroad Co. v. Newark, 10 N. J. Eq. 358, Chancellor Williamson, speaking of the burden of a railroad in a highway, says: "The easement of the highway is in the public, although the fee is technically in the adjacent owner. It is the easement only which is appropriated, and no right or title of the owner interfered with." Following this case is that of Hinchman v. Railroad Co., 17 N. J. Eq. 75, in which Chancellor Green described the burden of horse-railroads upon highways as follows: "They are ordinarily, as in this case, required to be laid level with the surface of the street, in conformity with existing grades. No excavations or embankments to affect the land are authorized or permitted. The use of the road is nearly identical with that of the ordinary highway. The motive power is the same. The noise and jarring of the street by the cars is not greater, and ordinarily less, than that produced by omnibuses and other vehicles in ordinary use. Admit that the nature of the use, as respects the traveling public, is somewhat variant, but how does it prejudice the land-holder? Is his property taken? Are his rights as land-holder affected? Does it interfere with the use of his property any more than an ordinary highway?" It is now established beyond question in this State that a horse-railway does not impose a servitude additional to the public easement upon the land in a highway. Hinchman v. Railroad Co., *supra*; Jersey City & B. R. Co. v. Hoboken H. R. Co., 20 N. J. Eq. 61; Railroad Co. v. Paterson, 24 N. J. Eq. 158; State v. Laverack, 34 N. J. Law, 201; Stoudinger v. Newark, 28 N. J. Eq. 187; Halsey v. Railway Co. (N. J.), 20 Atl. Rep. 859. A notable authority, here in point, is the case of Citizens' Coach Co. v. Camden Horse R. Co., 33 N. J. Eq. 267, where Mr. Justice Magie, in pronouncing the opinion of the court of errors and appeals, distinguishes the burden imposed by a horse-railroad upon a highway from the burden imposed by a steam-railway. Now, if a horse-railway is laid in a highway without legislative authority, what is the situation? The easement of the public, without the public's consent, is interfered with. Nothing is taken from the owner of the fee. The act is simply the creation of a public nuisance. The remedy against such a nuisance is by indictment, or, in a proper case, by suit in equity, instituted by the attorney-general. It is only where a private person suffers substantial injury from a public nuisance, differing from that suffered by the public at large, special to him and irreparable by suit for damages, that he may invoke the restraining power of this court. Van Wegenen v. Cooney, 45 N. J. Eq. 24, 16 Atl. Rep. 689, and cases there cited. The complainant in the case considered does not show that he will suffer special injury from the extension of the defendant's railway, as proposed. His position is not as strong as that of the complainant in Zabriskie v. Railroad Co., 13 N. J. Eq. 314. In that case Zabriskie was the owner of four vacant lots abutting on the southerly side of Grand street, in Jersey City. The Jersey City & Bergen Railroad Company had authority to build its horse-railway in the center of that street, but, instead of so doing, constructed it upon the southerly side of the street, so near the curb that it did not leave room for wagons to load and unload from the complainant's property, or for the complainant to place building materials when he should erect houses upon his property, as he presently proposed to do. An injunction was refused because the complainant did not show a present special injury. The chancellor thought, however, that the objections urged would show special injury by the running of cars, when the complainant should make use of his lots. In Hogencamp v. Railroad Co., 17 N. J. Eq. 83, a horse-railway was constructed, by authority of law, in a street built over land in which the fee was in the complainant. The complainant's property, abutting on the street, was occupied for business purposes, part as a manufactory and store, as part as an express office. He alleged that he would be specially injured in that the space between the track and the curb-stone would be so limited that it would not allow sufficient space for ordinary freight and express wagons to stand lengthwise across the street when loading and unloading, as they had been accustomed to do. Chancellor Green denied an injunction, remarking that the complainant's allegation of special injury would be material and significant if the railway had been constructed without authority, and had been a public nuisance. It has been insisted for the complainant, and with much confidence, that the present case is within Broome v. Telephone Co., 42 N. J. Eq. 143, 7 Atl. Rep. 851, where telephone poles were set up without authority of law upon the complainant's land in a highway, and Chan-

cellor Runyon issued a mandatory injunction for their removal, because their erection was an unwarrantable invasion of the complainant's property rights. The distinction between the two cases lies in the fact that in the present case the horse-railway does not burden the land with an additional servitude, while, in the case of Broome, the telephone poles were held to add a servitude beyond that for which the land had been condemned. Chancellor Runyon said: "It is enough to say, on that head, that it does not appear that the road board had any power to authorize any one to set up poles on the land of the highway, and thus subject the land to an additional servitude besides that for which it was condemned." The reason why the erection of telephone poles is regarded as imposing an additional servitude upon land in a highway is well stated by Vice-Chancellor Van Fleet in Halsey v. Railway Co., *supra*. The order to show cause must be discharged, with costs.

NOTE.—It is now well settled, in accordance with the decision in the principal case, that the construction of an ordinary horse-railway in a public street is not the imposition of an additional burden for which the abutting land owner is entitled to additional compensation. Elliott on Roads and Streets, 558; Cooley's Const. Lim. 556; Eichels v. Evansville, etc. Co., 78 Ind. 261; Elliott v. Fair Haven, etc. Co., 32 Conn. 579; Hiss v. Baltimore, etc. Co., 52 Md. 242; S. C., 36 Am. Rep. 371; Carson v. Central, etc. Co., 35 Cal. 325; Atty.-General v. Metropolitan, etc. Co., 125 Mass. 515; S. C., 28 Am. Rep. 264; Hobart v. Milwaukee, etc. Co., 27 Wis. 194; S. C., 9 Am. Rep. 461; Cincinnati, etc. Co. v. Cumminsville, 14 Ohio St. 523; Texas, etc. Co. v. Rosedale, 64 Tex. 80; Savanah, etc. Co. v. Mayor, 45 Ga. 602; Brown v. Duplessis, 14 La. Ann. 842; Randall v. Jacksonville, etc. Co., 19 Fla. 409; S. C., 17 Am. & Eng. R. R. Cas. 184; note to Chicago, B. & Q. R. R. v. McGinnis, 4 Cent. L. J. 11, 14, and New Jersey cases cited in the principal opinion. *Contra:* Craig v. Rochester, etc. Co., 39 N. Y. 404; People v. Kerr, 27 N. Y. 188. But where a street railway is so constructed and operated as to constitute a nuisance and a special injury to an abutter he may maintain an action for damages even though the fee of the street is in the city. Mahady v. Bushwick R. R. Co., 91 N. Y. 148; S. C., 43 Am. Rep. 661; Carli v. Stillwater, etc. Co., 28 Minn. 373; S. C., 41 Am. Rep. 290. And where a street railway is of such a nature and so constructed as to materially impair the rights of the abutter, as by depriving him of his right of access or materially interfering therewith, it ought, upon principle, to be considered as an additional burden. This is the doctrine of the New York Elevated Railway cases and others of a similar character. As shown by Mr. Curtis in a leading article in this JOURNAL upon the rights of abutters, an abutting land owner has a right of access to his premises, distinct from his rights in the street as a member of the general public, and this right is regarded as property, for the taking or destruction of which he is entitled to compensation. An Abutter's Rights in a Street, 24 Cent. L. J. 51. The legislature itself cannot deprive an abutter of this right without providing for compensation. Transylvania University v. Lexington, 3 B. Mon. (Ky.), 25; S. C., 38 Am. Dec. 173; Common Council v. Croas, 7 Ind. 9; Rensselaer v. Leopold, 106 Ind. 30; City of Indianapolis v. Kingsbury, 101 Ind. 200, 201; Rigney v. Chicago, 102 Ill. 64; *In re* N. Y. Elevated R. R. Co., 36 Hun, 427; Street Ry. v. Cumminsville, 14 Ohio St. 523; Lackland v. North Mo. R. R. Co., 31 Mo. 180; Abendroth v. Manhattan Ry. Co., 122 N. Y. 1; Theobald v. Louisville, etc. R. R. Co., 66 Miss. 279; S. C., 14 Am. St. Rep. 564; Moose v. Carson, 104 N. Car. 431; S. C., 17 Am. St. Rep. 681; Elliott on Roads and Streets, 526; and other authorities cited in 24 Cent. Law Jour. 51, 52. In New York and some of the other States an additional easement in the light and air over a street is also recognized in favor of the abutter, and it is said that "above the surface there can be no lawful obstruction to the access of light and air, to the detriment of the abutting owner." Story v. N. Y. Elevated Ry. Co., 90 N. Y. 122, 146; Adams v. Chicago, etc. Co., 39 Minn. 286; S. C., 12 Am. St. Rep. 644; Fifth Nat. Bank v. N. Y. Elevated Ry. Co., 24 Fed. Rep. 114; Lahr v. Metropolitan Elevated R. R. Co., 104 N. Y. 268; Kane v. Metropolitan Elevated R. R. Co., 26 N. E. Rep. 278; Dill v. School Board (N. J.), 32 Am. & Eng. Corp. Cas. 70.

The general principles above stated are fairly well settled, but the application of steam and electricity as a motive power to ordinary street railways having their rails even with the surface of the street has given rise to a new question of considerable difficulty. It is also a question of increasing importance, and different courts have given a different answer. Is such a use of a street an additional burden for which the abutting property owner is entitled to compensation? In view of the novelty of the question and the conflict among the authorities, it may not be amiss to review the cases upon this subject at some length. At the present time the weight of authority seems to be in favor of the negative. In the case of Lockhart v. Craig St. Ry. Co., 21 Atl. Rep. 26; S. C., 32 Cent. Law Jour. 240, the Supreme Court of Pennsylvania held that the construction of an electric railway and the erection of poles and wires in a street is not the imposition of an additional burden for which the adjoining owner is entitled to compensation, and that injunction will not lie to restrain its operation upon the ground that the legislature has provided no means for assessing or securing compensation to the adjoining owners. The court says: "It may now be taken as settled that the owners' rights of abutting property are subject to the paramount right of the public, and the rights of the public are not limited to a mere right of way, but extend to all beneficial legitimate street uses, as the public may from time to time require. The use of streets for sewers, tunneling, public cisterns, gas-pipes, water-pipes, and other improvements necessary for the comfort and convenience of the citizens of cities and towns, so long as they do not substantially interfere with the use of the streets as such, appears to be under legislative and municipal control. "The court concludes by saying that the use of poles, wires and other necessary appliances for an electric railway is not any greater interference with the rights of the adjoining property owner than the use of streets for fire-plugs, horse-troughs, and lamp-posts. A similar view was taken by the New Jersey court in the case of Halsey v. Ry. Co., 20 Atl. Rep. 859; S. C., 32 Cent. Law Jour. 179, and also by the Supreme Court of Rhode Island. Taggart v. Ry. Co., 19 Atl. Rep. 326. So, it has been held by several other courts that street railways operated by steam motors are not additional servitudes and that their use does not, therefore, constitute a "taking" for which the abutter is entitled to compensation, but that they are merely a new and improved means of using the street as a highway,

which must have been contemplated when the street was dedicated or condemned. Williams v. City Ry. Co., 41 Fed. Rep. 556; Briggs v. Lewiston (Me.), 10 Atl. Rep. 47; Newell v. Ry. Co., 35 Minn. 112; s. c., 59 Am. Rep. 303; s. c., 27 N. W. Rep. 889. The cases holding that the erection of telegraph and telephone poles and wires is not an additional burden also lend support to this doctrine. See Julia Building Ass'n v. Bell Tel. Co., 88 Mo. 258; Pierce v. Drew, 136 Mass. 75; s. c., 49 Am. Rep. 7. And in New York it is held that there is no difference between a railroad operated by horse power and one operated by steam, where the latter is not exclusive in its nature. Fobes v. Rome, etc. R. R. Co., 121 N. Y. 505. This is also the conclusion reached by the writer of the note to Chicago, B. & Q. R. R. Co. v. McGinnis, 4 Cent. Law Jour. 11, 14, in which it is said that the only difference is in degree and not in kind.

On the other hand it was held by the Supreme Court of Tennessee, in a recent case, that a street railway whose cars used for carrying passengers only are propelled by a dummy steam-engine, is an additional burden or servitude, and the owner of the fee in the street is entitled to compensation as for a taking of his property for public use, notwithstanding the railway was constructed by authority of law. Street Ry. Co. v. Doyle, 88 Tenn. 747; s. c., 17 Am. St. Rep. 933. No case is cited by the court in support of its opinion, and the writer has been unable to find any other decision directly in point unless it is that in the case of Theobold v. Louisville, etc. Ry. Co., 66 Miss. 279; s. c., 14 Am. St. Rep. 564. The statement of facts in that case shows that it was an action of trespass brought by an abutter against a street railway company for constructing and operating its road in the street in front of his property without his consent and without any condemnation proceedings, but the court in its opinion seems to treat the railway as an ordinary steam railroad. The Tennessee case is, however, supported, in principle at least, by the decisions holding that the erection of telegraph and telephone wires is the imposition of an additional burden for which the abutting owner is entitled to compensation. Western U. Tel. Co. v. Williams, 86 Va. 696; s. c., 11 S. E. Rep. 106; Board of Trade Tel. Co. v. Barnett, 107 Ill. 507; s. c., 47 Am. Rep. 453; Dusenbury v. Mut. Tel. Co., 11 Abb. N. Cas. 440; Smith v. Cent. Tel. Co., 2 Ohio Circ. Ct. 259; Am. Tel. Co. v. Smith (Md.), 18 Atl. Rep. 910; Broome v. N. Y., etc. Tel. Co. (N. J.), Atl. Rep. 851. See also Gay v. Mut. Un. Tel. Co., 12 Mo. App. 485; Forsyth v. B. & O. Tel. Co., 12 Mo. App. 494. And there are weighty reasons in favor of this view. There has certainly been a wide departure in modern times from the old doctrine that "the owner of the soil has a right to all above and under ground, except only the right of passage for the king and his people." Even an ordinary horse railway company must have a sort of private right in the street, which, is in its very nature exclusive to a certain extent; otherwise it could not successfully carry on its business. When electric poles and wires come to be added, constituting a permanent obstruction, or when the cars are run by steam, causing additional noise and calculated to frighten horses and make the ordinary use of the street more dangerous, there is much reason for holding that an additional burden has been imposed and a new use made of the highway never contemplated when it was dedicated or condemned, especially when we come to consider that most of our streets were laid out when such a use was unheard of. And, as a matter of fact, a street railway with cars operated by steam or electricity may cause the abutter as much annoyance and interfere with his right of access almost as seriously as an ordinary commercial steam railroad.

It is well settled, in accordance with the decision in the principal case, that the mere fact that an obstruction in a street is unauthorized and constitutes a public nuisance, will not give the abutting land owner a right to maintain injunction unless he is specially injured thereby. An Abutter's Right in a Street, 24 Cent. Law Jour. 51, 54; Elliott on Roads and Streets, 496. But an injunction will lie to prevent the deprivation of his right of access. Carter v. City of Chicago, 57 Ill. 283; Earll v. City of Chicago (Ill.), 26 N. E. Rep. 370; Ross v. Thompson, 78 Ind. 90. And it may be stated as a general rule that whenever abutting land owners are entitled to compensation for the construction of a railway of a kind constituting an additional servitude and amounting therefore to a "taking," an injunction will be granted to prevent such appropriation until compensation is made. People v. Law, 34 Barb. 494; Kavanagh v. Mobile, etc. R. R. Co. (Ga.), 4 S. E. Rep. 113; Colstrume v. Minneapolis, etc. R. R. Co., 33 Minn. 516; Scioto Valley R. R. Co. v. Laurence, 38 Ohio St. 41; Broome v. Tel. Co., 42 N. J. Eq. 143; s. c., 7 Atl. Rep. 851; Story v. N. Y. El. R. R. Co., 90 N. Y. 122; High on Inj. sec. 399. But it was held in a recent Kentucky case that an elevated railway was not *per se* an encroachment upon the abutter's rights and that, as it could not be told until after it had begun to run its trains, whether the abutter would be injured, its construction would not be enjoined in advance. Fulton v. Short Route Ry. Co., 85 Ky. 640; s. c., 4 S. W. Rep. 332. The correctness of this decision seems doubtful. See, however, Building Ass'n v. Bell Tel. Co., 13 Mo. App. 477; Tilton v. N. O., etc R. R. Co., 35 La. Ann. 1062. For a further consideration of the rights and remedies of abutters, see An abutter's Rights in a Street, 24 Cent. Law Jour. 51.

W. F. ELLIOTT.

Indianapolis.

JETSAM AND FLOTSAM.

SUNDAY LAWS—WORKS OF NECESSITY.—The Supreme Court of Pennsylvania has racked its great brain upon the question what is a work of necessity within the meaning of a Sunday law, and has come to the conclusion that the employment of a barber on that day is not such a work. A man must shave on Saturday night, thereby violating the real Mosaic command—for Saturday is the Jewish Sabbath, and not the Christian Sunday. He must, therefore, elect to violate the law of God by shaving on Saturday, or else violate the law of man by shaving or getting shaved on Sunday, or else go to church unshaved. The St. Louis Court of Appeals, in a recent unreported opinion delivered by Biggs, J., has taken a more liberal view of the question, holding that where a young gentleman took a railway train to see his lady love on Sunday in a distant city, and missed the train while in a restaurant getting his breakfast, the act of sending a telegram to her, explaining the cause of his delay, was a work of necessity. The court proceeded upon the idea that there is such a thing as a moral or social necessity, and took a just view that what ordinary men of correct moral impulses would regard to be necessary under the circumstances is a necessity within the meaning of such a statute. Think of the suffering which the failure to send such a telegram

might entail upon the young lady. They might be engaged, and she might feel even more solicitous than a wife would feel under the same circumstances. She might imagine him chewed up in a railway accident, or charred to a crisp by the inevitable coal stove.—*American Law Review.*

RECENT PUBLICATIONS.

BEACH ON PRIVATE CORPORATIONS.

It would require more space than we can conveniently give, to point out the many features of excellence in these two bulky volumes, the latest and apparently the most complete work on corporations now to be had. One cannot but be impressed with the energy and diligence of the author, who in the midst of an active practice and while engaged in other work, has been enabled to turn out a thorough and exhaustive treatise of this character. Throughout the book, the evidence of careful work and conscientious attention to details is at hand, and without entering into particulars, the difficulty of which, within the limits of this notice, will be understood, we feel justified in the statement that within the compass of these two volumes will be found the modern law as applicable to companies and corporations. No corporation attorney can afford to be without them, and the library of every practitioner should contain them. Mr. Beach is not only a book writer but he is in this instance at least something of an authority on the subject, about which he writes, and therefore it has an additional value. The book is first class in every respect, including the printing, binding and the well prepared index.

THE QUESTION OF COPYRIGHT.

In view of the passage of the recent international copyright bill, this book will be found of special interest as it presents in convenient form for reference a summary of the more important of the copyright laws, and international conveyances now in force in the chief countries in the world. It discusses the nature and origin of copyright, literary property, international copyright; contains the text of the act of March, 1891, and an analysis of its provisions, the copyright law of Great Britain, and bills now pending in England. There is also an essay on cheap books and good boods, and one on the contest for international copyright.

THE RELATION OF LABOR TO THE LAW OF TO-DAY.

This book is perhaps more of a treatise on political economy than on law, though it is of undoubted interest to students of the latter. It discusses the labor questions and labor struggles, and goes at length into the development of labor combinations and trades union, with special reference to the features of the law governing such. It contains also a review of the economic principles of the labor question, and closes with what is put forward as a solution of that question.

AMERICAN STATE REPORTS, VOL. 18.

The Missouri case of Craig v. Van Bebber, reported in this volume has a note of one hundred and fifty pages, exhaustively reviewing the authorities on the subject of disaffirmance of deed of infant. There are also to be found many other cases of value and interest.

LAWYERS' REPORTS ANNOTATED, Books IX and X.

We confess to a great weakness, if it may properly be called such, for this set of reports. It is a pleasure to turn from volumes containing dry reports of cases, to these, where the eye and the brain will find relief in diversified type, and readable notes and comments upon the cases reported, to say nothing of the briefs of attorneys, which is a prominent and valuable feature of these reports. The selection of cases reported is first class, and as we are firm believers in the sifting of cases, the separating of the grainy decisions from the loads of judicial chaff, and the throwing away of the latter, we find much satisfaction in these volumes.

AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW, Vol. XV.

This volume, the latest of the series, contains many articles of special interest. The subject of "Mechanic's Liens" finds more extended treatment here than in any text-book on the subject—over two hundred pages being devoted to it. Medical jurisprudence, mercantile agency and merger are intelligently reviewed. Mines and mining claims, containing the modern law on that important subject, is a paper of decided merit and quite exhaustive. The subject of mortgages and municipal corporations, of course, take a great many pages, and are exhaustively discussed, though there are special papers on municipal courts and municipal securities. The article on municipal corporations is particularly well prepared, and fills nearly three hundred pages, a large part of which is notes. We have heretofore taken occasion to speak of the general excellence and value of this series, and content ourselves here with saying that as the series progresses it grows in strength and value.

VESTED RIGHTS.

This book consists of well selected cases with very copious and able annotations on those fundamental and constitutional principles, which have for their object the protection of vested rights of property. The author says that the large number of cases found in the reports, in which the validity of legislation is challenged under these principles, led him to believe that a work of the kind offered would be acceptable to the profession. A study of the cases reported in the light of the notes, will show that his belief is well founded. It is not only a work of good practical value but is a storehouse of information and learning for the student of constitutional law. It is divided into chapters on the subjects of retrospective laws generally, and laws affecting the remedy, due process of law generally and therein of notice and opportunity to be heard, summary proceedings and police power. Other chapters treat of the obligations of contracts generally and as applied to municipal and also to private corporations. The chapter on private corporations is especially valuable. The cases reported are leading ones, and the notes full of authorities. The book is well put together, the typographical appearance being particularly good.

DANIEL ON NEGOTIABLE INSTRUMENTS.

It seems unnecessary to say anything to our readers by way of review of this already well known work. The present is the fourth edition. The first edition

appeared in 1876, the second in 1879, and the third in 1882, a record which speaks for itself. It can be said that it is to-day, as it has been for years, the most extensive and popular treatise on the subject of negotiable instruments published in this country. It discusses with clearness and cites exhaustively all the cases, upon every conceivable topic connected with the subject of negotiable instruments, including notes, bills of exchange, certificates of deposit, and of stock, bank notes, bills of lading, bonds of all kinds, etc. The present edition has been much enlarged from the last one and many cases added. It is in two large handsome volumes.

BOOKS RECEIVED.

ALL THE LAWS OF THE STATE OF ILLINOIS, passed by the Thirty-seventh General Assembly. Convened January 7, 1891. Adjourned Sine Die June 12, 1891. With headnotes and references to the Revised Statutes of 1889. By Myra Bradwell. Chicago Legal News Company. 1891.

QUERIES.

QUERY NO. 1.

In Missouri in an attachment suit there is a plea in abatement which is decided in favor of defendant, can plaintiff appeal without proceeding to a judgment on the merits, and if plaintiff should appeal does the circuit court acquire jurisdiction? R. R.

HUMORS OF THE LAW.

Eminent Advocate (to possible juror): Do you entertain any conscientious scruples against the infliction of capital punishment?

Possible Juror (confidently): John Smith, 62 years old last grass, thank ye.

Advocate (wrathfully): I did not ask your name.

Possible Juror (cheerfully): No sir, hain't read nuthin' about the case.

Advocate (roaring): Are you deaf or a fool!

Possible Juror: You'll haf to speak a little louder. I'm kinder hard o' hearin'.

Advocate: Accepted!

A TOO EXPENSIVE CONVICTION—Roscoe Conkling came into Charles O'Conor's office one day in a nervous state.

"You seem to be very much excited, Mr. Conkling," said Mr. O'Conor, as Roscoe walked up and down the room.

"Yes, I'm provoked—I'm provoked," said Mr. Conkling. "I never had a client dissatisfied about my fee before."

"Well, what's the matter?" asked O'Conor.

"Why, I defended Gibbons for arson, you know. He was convicted, but I did hard work for him. I took him to the superior court and he was convicted; then to the supreme court, and the supreme court confirmed the judgment and gave him ten years. I charged him $600, and Gibbons is grumbling about it—says it is too much. Now, Mr. O'Conor, I ask you, was that too much?"

"Well," said O'Conor, very deliberately, "of course you did a great deal of work, and $600 is not a big fee; but to be frank with you, Mr. Conkling, my deliberate opinion is that he might have been convicted for less money."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACCIDENT—Insurance.—Where a person, injured in an accident resulting in hernia, dies after a dangerous and unsuccessful surgical operation resulting in peritonitis, performed when death seemed inevitable without it, the accident is the proximate cause of his death.—*Travelers' Ins. Co. v. Murray*, Colo., 26 Pac. Rep. 774.

2. APPEAL—Temporary Injunction.—An order of the district court, or a judge thereof at chambers, allowing a temporary injunction, may be reviewed in the supreme court before final judgment in the case.—*Andrews v. Love*, Kan., 26 Pac. Rep. 746.

3. APPEAL BOND—Illegal Condition.—Under Act Pa. March 29, 1832, § 59, the orphans' court cannot compel an appellant to give bond containing also a condition for the payment of damages caused by the appeal where the appellant is not a trustee, and owes no fiduciary duty to the court or to the appellees.—*Commonwealth v. Wistar*, Penn., 21 Atl. Rep. 872.

4. APPEAL FROM INFERIOR COURT—Pleading.—When an appeal is taken from the county court to the district court, the case is to be tried in the appellate court upon the issues that were presented in the court from which the appeal was taken.—*Bishop v. Stevens*, Neb., 48 N. W. Rep. 827.

5. APPELLATE COURT—Jurisdictional Amount.—Act Ind. Feb. 28, 1891, § 1, confers on the appellate court exclusive jurisdiction of appeals in "all cases for the recovery of money only where the amount in controversy does not exceed $1,000." *Held* that, where plaintiff sued for damages for breach of a contract, and recovered $775, but defendant averred performance thereof, and counter claim for $525, the amount "in controversy" was $1,300, and the appellate court had no jurisdiction.—*Wysor v. Johnson*, Ind., 27 N. E. Rep. 655.

6. ASSIGNMENT BY INSOLVENT BANK.—In a suit on a note and mortgage executed to a bank, and by it assigned to plaintiff, an answer alleging that the assignor is "a bank of deposit and discount organized under the laws of the State of Indiana," and that it assigned the mortgage after it and plaintiff knew it to be insolvent, is demurrable as failing to show that the bank is within the provisions of Rev. St. Ind. § 2697, declar-

ing that assignments and transfers of evidences of indebtedness by such banks when insolvent, with a view to prefer a creditor shall be void.—*Brighton v. White*, Ind., 27 N. E. Rep. 620.

7. ASSIGNMENT OF TAX CERTIFICATE.—Though the tax-deed is insufficient to carry title, still it is sufficient evidence of the assignment to enable the grantee to recover taxes paid.—*Pitkin v. Reibel*, Mo., 16 S. W. Rep. 244.

8. ASSUMPSIT—Joint Liability.—Plaintiff gave C a sum of money for safe-keeping, and a smaller sum to J the other defendant for a similar purpose. C never parted with the custody or control of the deposit. *Held*, in an action against both to recover the money that there was no joint liability, and defendants were entitled to a verdict.—*O'Connor v. O'Connor*, Mich., 48 N. W. Rep. 871.

9. ATTACHMENT—Wrongful—Damages.—The attaching creditor cannot reduce the damage by evidence that at the time of the seizure the debtor contemplated selling his goods in bulk at a sacrifice.—*Estes v. Chesney*, Ark., 16 S. W. Rep. 267.

10. BANKS—Cashier.—The general powers of cashiers of banking institutions do not extend to the making of obligations or binding contracts beyond the scope of their duties as cashier. They have no right to create new liabilities against the bank of an extraordinary character. Their powers are defined and limited by law, and persons dealing with them are bound to know the extent of them.—*North Star Boot & Shoe Co. v. Stebbins*, S. Dak., 48 N. W. Rep. 833.

11. CARRIERS—Passengers—Ejection.—The use, in the presence of ladies, of profane language by a passenger on a railroad train, if provoked by the conductor's falsely charging him with not having paid his fare, and uttered in the heat of passion, will not excuse the railroad company from liability for ejecting him.—*Louisville, N. A. & C. Ry. Co. v. Wolfe*, Ind., 27 N. E. Rep. 606.

12. CHATTEL MORTGAGES—Foreclosure.—It is no defense to the foreclosure of a chattel mortgage that it was not recorded as required by Rev. St. Ind. § 4913, under which failure to record avoids the mortgage only as to third persons.—*Reynolds v. Quick*, Ind., 27 N. E. Rep. 619.

13. CHATTEL MORTGAGES—Lien.—As between the parties to a chattel mortgage the lien thereby created continues so long as there is a subsisting debt which can be enforced in the courts. The filing or refiling of a chattel mortgage, as required by statute, is for the protection of creditors and *bona fide* purhasers without notice, and not for the purpose of continuing the lien as between the parties to the mortgage.—*Sanford v. Mumford*, Neb., 48 N. W. Rep. 876.

14. CHATTEL MORTGAGES—Partnership. — An existing *bona fide* indebtedness may be secured by chattel mortgage duly executed by the individuals composing a partnership, of which the husband is a member, to the wife, notwithstanding the fact that the firm has been sued, and its creditors are about to levy upon the firm property.—*Berkley v. Tootle*, Kan., 26 Pac. Rep. 730.

15. CHATTEL MORTGAGES—Trover.—The common-law rule that trover will not lie in favor of the mortgagor against the mortgagee who has taken possession of the goods for condition broken is not changed by the Colorado Code of Civil Procedure, which abolishes the forms of action, and hence, in the absence of fraud, the mortgagor cannot recover of the mortgagee the difference between the value of the goods taken possession of by him and the price for which he sold them.—*First Nat. Bank v. Wilbur*, Colo., 26 Pac. Rep. 777.

16. CONSPIRACY — Acts and Declarations.— Each co-conspirator is liable for the acts and bound by the declarations of his co-conspirators, done or said during the continuance of the conspiracy, touching its object and conduct: and it is immaterial at what time he joined the conspiracy, or whether he was actually present when the particular acts were commited.—*United States v. Logan*, U. S. C. C. (Tex.), 45 Fed. Rep. 872.

17. CONSTITUTIONAL LAW—Municipal Corporations—Taxation.—The provisions of section 6, art. 9, of the constitution, that "the legislature may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessments or by special taxation of the property benefited," do not prohibit the legislature from conferring the power to make local improvements by special assessment or taxation of property benefited upon counties.—*Darst v. Griffin*, Neb., 48 N. W. Rep. 819.

18. CONSTITUTIONAL LAW—Statute.—Under the constitutional provision that "no law shall be revived or amended by reference to its title, only that the act revived or the section or sections amended shall be inserted at length," the repeal, by reference to its title only, of an act repealing a prior act, will not revive the former act.—*Wallace v. Bradshaw*, N. J., 21 Atl. Rep. 941.

19. CONTRACT—Cancellation—Fraudulent Representations.—In a suit to cancel a contract for the purchase of land upon the ground of fraud and false representations a failure to aver that the representations were false and fraudulently made, with intent to deceive, or an equivalent averment, is fatally defective.—*Birmingham, etc. Co. v. Elyton Land Co.*, Ala., 9 South. Rep. 235.

20. CONTRACT—Mining Lease.— Upon the facts, *held*, that the parties had effected a binding and effective agreement for a lease of mining property.—*Cochrane v. Justice Min. Co.*, Colo., 26 Pac. Rep. 780.

21. CONTRACT—Offer to Sell.—A letter construed to be merely an offer which required acceptance, and motive of acceptance before it could constitute an agreement.— *Graff v. Buchanan*, Minn., 48 N. W. Rep. 915.

22. CONTRACT—Waiver of Non-performance.—The fact that a contractor did not complete his work within the time limited therefor, and did not do all of it according to the specifications, does not preclude him from suing on the contract where the other party has, by accepting the work, waived these objections.—*Cummings v. Pence*, Ind., 27 N. E. Rep. 631.

23. CONTRACT FOR WAGES.—The fact that a woman, on the death of her father, goes to live in the family of a relative, and there performs household duties for 16 years, without any payment or settlement for services, raises such a presumption that she lived there as a member of his family that she can only recover for services by showing an express or implied contract for wages.—*Collar v. Patterson*, Ill., 27 N. E. Rep. 604.

24. CORPORATION—Consolidation—Citizenship.—When a consolidated company is formed by the union of several corporations chartered by different States it is a citizen of each of the States which granted the charter to any one of its constituent companies, and when sued in one of these States it cannot claim the right of removal on the ground that it is also a citizen of another State.—*Fitzgerald v. Mo. Pac. R. Co.*, U. S. C. C. (Neb.), 45 Fed. Rep. 812.

25. CRIMINAL EVIDENCE—Confessions.—On a trial for horse-stealing, where the accused testified that he never had possession of the horse, he may be contradicted by proof of a statement made by him in jail to the effect that he had gotten the horse from another Mexican; such a statement not being a confession, within Code Crim. Proc. Tex. art. 750.—*Quintano v. State*, Tex., 16 S. W. Rep. 258.

26. CRIMINAL EVIDENCE — Homicide — Character.—A witness who testifies to the good character of a defendant for peaceableness, and that he had never heard of defendant having a difficulty before, may be asked on cross-examination if he had never heard of defendant's shooting any one before, and if he had never heard of his shooting a man in another State.—*Ozburn v. State*, Ga., 13 S. E. Rep. 247.

27. CRIMINAL LAW—Breach of Peace.—Shouting in the streets of a village, between 9 and 10 o'clock at night, so loudly as to be heard 150 feet distant, is a breach of the peace. Such shouting was not in the "presence" of an officer, so as to justify an arrest without a warrant,

when the officer was 150 feet away, on another street, and did not see the offender, and had no direct knowledge that it was he who committed the offense.—*People v. Johnson*, Mich., 48 N. W. Rep. 870.

28. CRIMINAL LAW—Continuance.—Code Crim. Proc. Tex. art. 669a, provides that where two are indicted separately for offenses growing out of the same transaction, one may file his affidavit that he believes there is not sufficient evidence to convict the other, whose testimony is necessary to the affiant's defense, and thereupon the other shall be tried first, "provided that the making of such affidavit does not, without other sufficient cause, operate as a continuance to either party:" *Held*, that when the prescribed affidavit had been made the State could not continue as to the one for whose testimony the affidavit was made, and then force the affiant to trial.—*Forcey v. State*, Tex., 16 S. W. Rep. 261.

29. CRIMINAL LAW—Embezzlement— Partner.—Under the general Criminal Code defining embezzlement as a criminal offense, the misappropriation of partnership funds by one of the general partners, with felonious intent, does not constitute embezzlement.—*State v. Reddick*, S. Dak., 48 N. W. Rep. 846.

30 CRIMINAL LAW—Embezzlement.—Where just before the dissolution of a firm the outgoing partner turned over to defendant one of the firm's sewing-machines to sell, and defendant sold it, and appropriated the proceeds, the court properly instructed the jury, that if defendant sold the machine under authority of the outgoing partner, without knowledge that it belonged to the remaining partner, then he was not guilty, but if at the time he sold it he knew that the interest of the outgoing partner had been transferred to the remaining partner, then in selling the machine he acted as agent of the remaining partner, and in appropriating the proceeds was guilty of embezzlement.—*Aldrich v. State*, Tex., 16 S. W. Rep. 251.

31. CRIMINAL LAW—False Pretenses.—Under Pub. St. Mass. ch. 203, § 60, evidence that defendant, who had previously paid cash for his purchases, and sold them at retail, bought large lots of goods worth many thousand dollars, paid nothing therefor, but obtained long terms of credit, and disposed of the goods at auction at less than half the wholesale value, will sustain a conviction.—*Commonwealth v. Drew*, Mass., 27 N. E. Rep. 593.

32. CRIMINAL LAW—Imprisonment.—Act Tex. March 29, 1887, provided that "all the persons under 16 years of age," who should thereafter be convicted of certain felonies, should be confined in the State reformatory "for the term of his or her sentence." Act Tex. April 2, 1889, provided that "all male persons under 16 years of age," who should thereafter be convicted of such felonies, should be confined in the State reformatory: *Held*, that the latter act repealed by implication so much of the former act as allowed females to be confined in the reformatory.—*Ex parte Creel*, Tex., 16 S. W. Rep. 256.

33. CRIMINAL LAW—Larceny—Admissions of Counsel.—A conviction of larceny cannot be predicated on the admissions of counsel, and it is error to charge that counsel have admitted the stealing with felonious intent, and the only question is as to the value of the property.—*People v. Hall*, Mich., 48 N. W. Rep. 869.

34. CRIMINAL LAW — Murder. — The statutes of the United States, providing for the punishment of the crimes of murder and manslaughter, do not define murder, but do manslaughter. We must therefore go to the common law to ascertain the definition of murder. —*United States v. Boyd*, U. S. C. C., (Ark.), 45 Fed. Rep. 851.

35. CRIMINAL LAW —Resentence—Jeopardy.—Rev. St. Wis. § 2112, requiring prisoners to be resentenced where, by reason of irregularities subsequent to verdict, the judgment is reversed, is not unconstitutional, as putting defendant twice in jeopardy.—*McDonald v. State*, Wis., 48 N. W. Rep. 863.

36. CRIMINAL PRACTICE — Complaint— Jurat.—Where the complaint, as presented in the record, has no jurat, it will not support an information; and, where the jurat fails to disclose the official character of the person before whom the affidavit was made, the unauthorized addition of the letters "J. P." to his signature by some person unknown, after the term of the court had expired, will not supply the defect.—*Neiman v. State*, Tex., 16 S. W. Rep. 253.

37. CRIMINAL TRIAL — Continuance. — A refusal of a continuance in the midst of a trial to procure an absent witness is proper where it is not shown what is expected to be proved by him, or that any diligence has been used to procure his presence.—*State v. Luke*, Mo., 16 S. W. Rep. 242.

38. CRIMINAL TRIAL—Defendant as Witness.—A defendant who voluntarily becomes a witness in his own behalf is subject to the same rule as any other witness, and may be asked by the State, on cross examination, if he had not been convicted of larceny at the previous term of the same court in which he was being tried.—*State v. Probasco*, Kan., 26 Pac. Rep. 749.

39. CRIMINAL TRIAL—Homicide—Instructions.—An instruction to acquit of murder unless the jury have an abiding and "absolute" belief of defendants' guilt requires too great a measure of proof.—*Whatley v. State*, Ala., 9 South. Rep. 236.

40. CRIMINAL TRIAL—Homicide—Self-defense.—An instruction that if defendant killed deceased in resisting an attempt on the part of deceased to "murder" defendant, or an attempt to do defendant great bodily harm, then the killing was justifiable, is not fatally erroneous, as it does not tend to lead the jury to understand that an attempt to kill defendant not constituting murder would not justify the killing by defendant.—*People v. Bruggy*, Cal., 26 Pac. Rep. 756.

41. DEED—Construction.—A deed written on a blank form, apparently by an unskilful person, recited that "this indenture, made—between—of the first part, and M the heirs of her body, of the second part, witnesseth," etc. There was a warranty of the title to "M, and the heirs of her body," the last phrase being substituted for the printed words "heirs:" *Held*, that such deed conveyed no estate to her children, but a fee-tail to the grantee, which, by Code Ala. § 1825, became a fee-simple. —*Slayton v. Blount*, Ala., 9 South. Rep. 241.

42. DEED—Construction.—By a deed naming his wife as "party of the second" part, and in consideration of one dollar and natural love and affection to his wife and their children born and to be born, a father conveyed land to his wife and said children, "to have and to hold unto said party of the second part and the children aforesaid forever." The deed reserved to the father the power to sell and convey in conjunction with the wife, and, in case of her death, the right to convey was reserved to the father alone: *Held*, that the wife took as tenant for life with remainder to the children, and not as a joint tenant with them.—*Goodridge v. Goodridge*, Ky., 16 S. W. Rep. 270.

43. DEED—Delivery.—The delivery of a deed by the grantor to a third person, to be given to the grantee at once, or on the happening of some future event, as his own death, is a good present delivery to the grantee, and vests in him the estate of the grantor; but it is otherwise if the grantor reserves to himself any future control over the deed.—*McCalla v. Bane*, U. S. C. C. (Oreg.), 45 Fed. Rep. 828.

44. DEED—Description.—A deed of conveyance, only describing the premises conveyed, as being all of a designated tract not conveyed by the grantors to a third party named, is insufficient of itself, and without proof as to what part of the tract had not been conveyed to the third person, to show title to any of such lands in the grantee in such deed.—*Maier v. Joslin*, Minn., 48 N. W. Rep. 909.

45. DEED—Reformation.—Upon the facts held such a mistake as will support a cause of action in a court

equity to have the deed reformed.—*MacVeagh v. Burns*, S. Dak., 48 N. W. Rep. 835.

46. DEVISE IN TRUST.—Where the wife of a devisee of real estate takes care of the testator during his last sickness, and in order to avoid altering his will, that he may compensate her according to his desire, the testator obtains a promise from the devisee that he will convey such real estate to his wife after the decease of the testator, it will be decreed that such devisee takes such property in trust, and his conveyance to his wife will be upheld in equity against the judgment creditors of the husband and devisee.—*Carver v. Todd*, N. J., 21 Atl. Rep. 942.

47. DIVORCE—Custody of Child.—A decree of divorce, awarding the custody of a child to the husband, is conclusive on the parties, unless modified or set aside, and the wife cannot, to justify her taking the child, show that it is for the child's interest.—*Leming v. Sale*, Ind., 27 N. E. Rep. 619.

48. DRAINAGE—Appeal. — Where proceedings for the construction of a ditch are appealed from the board of commissioners to the circuit court for trial *de novo*, the judgment of that court in the matter is binding on all persons whose property was assessed for the construction of the ditch, though they neither petitioned for its construction nor remonstrated against it. — *Mills v. Hardy*, Ind., 27 N. E. Rep. 618.

49. EMINENT DOMAIN — Compensation.—Where commissioners in a railroad right of-way proceeding award damages for injuries to a tract of land to a certain land and cattle company as the owner thereof, and also allow nominal damages to another party for injuries to the same land, and the latter appeals from such award to the district court, before he can recover damages in said court he must show that he had some interest in the land over which the right of way was condemned, at the time of the condemnation proceedings.—*Chicago, K. & W. R. Co. v. Eusley*, Kan., 26 Pac. Rep. 731.

50 ESTOPPEL—Declarations. — The plaintiff owned a half interest in certain land. The defendant's grantor applied to rent it, and was told by the plaintiff that he had sold to his co-tenant, and had nothing to do with renting it. The defendant's grantor thereupon bought the land from the co-tenant: *Held*, that the plaintiff was not estopped, as against such purchaser, the declaration being made casually, and after plaintiff has contracted to sell the land.—*Reutzel v. McKinney*, Ark., 16 S. W. Rep. 265.

51. EXECUTION—Exemption.—The allegation of proof that the judgment upon which the execution was issued is "a judgment for labor" is not equivalent to an allegation or proof that it was a judgment for "laborer's or mechanic's wages," within the meaning of § 5136.—*Paddock v. Balgord*, S. Dak., 48 N. W. Rep. 840.

52. EXECUTION—Sale.—Where real property consisting of several known lots or parcels, has been levied upon, the lots or parcels must be offered for sale separately; but, if no bidders can be found for the separate parcels, the land can be sold in gross. A creditor cannot be deprived of the privilege of having the land sold *en masse* after the fact has been ascertained that it cannot be sold in lots.—*First Nat. Bank v. Block Hills Fair Assoc.*, S. Dak., 48 N. W. Rep. 852.

53. EXEMPTION.—The provisions of section 531 of the Code, which read, "Nor shall anything in this chapter be construed to exempt from execution or attachment property of the value of five hundred ($500) dollars for any debt contracted by any person in purchase of the actual necessaries of life, for himself or family," do not apply to debts contracted by the head of the family for groceries and provisions furnished him as supplies for a boarding house.—*Lehnhoff v. Fisher*, Neb., 48 N. W. Rep. 821.

54. FEDERAL COURTS—Jurisdiction.—A proceeding in equity to compel the transfer upon the books of a corporation of corporate stock which the complainant had purchased from a third person, is not a suit "to recover the contents of any promissory note or other chose in action in favor of any assignee" of which jurisdiction is excluded from the federal courts by Act Cong. 1888, §1.—*Jewett v. Bradford Sav. Bank & Trust Co.*, U. S. C. C. (Vt.), 45 Fed. Rep. 801.

55. FEDERAL COURTS— Removal of Cause.—The voluntary appearance of defendant, and demurrer, in a State court, before expiration of the time within which he was required to plead, in no way limits his right to file a petition and bond for removal of the cause to the federal court at any time before expiration of such time.—*Conner v. Skagit Cumberland Coal Co.*, U. S. C. C. (Wash.), 45 Fed. Rep. 802.

56. FRAUDS, STATUTE OF—Debt of Another.—A verbal promise to pay the debt of another is within the statute of fraud unless it is in effect, substituted for the original liability. — *Brant v. Johnson*, Kan., 26 Pac. Rep. 735.

57. FRAUDULENT CONVEYANCES.—A creditor need not exhaust all his debtor's remaining property before bringing suit to set aside a voluntary conveyance of some of his property.—*McConnell v. Citizens' State Bank*, Ind., 27 N. E. Rep. 616.

58. FRAUDULENT CONVEYANCES—Parties.—A bill in equity against a trustee to subject property alleged to have been fraudulently conveyed to him cannot be sustained when the debtor is not a party, and complainant has no judgment against him, but merely alleges indebtedness upon promissory notes.—*Chadburn v. Coe*, U. S. C. C. (Minn.), 45 Fed. Rep. 822.

59. GUARDIAN OF LUNATIC.—Services rendered to a lunatic at the request of his guardian, or under a contract with the guardian, constitute a good cause of action against the guardian personally.—*Baker v. Groves*, Ind., 27 N. E. Rep. 640.

60. HIGHWAY—Contributory Negligence.— An intoxicated person who is injured by an accident caused by his attempting to drive over a washout, which he could have easily seen and avoided had he been sober, cannot recover from the county therefor, since driving when intoxicated constituted contributory negligence.—*Woods v. Board of Commissioners*, Ind., 27 N. E. Rep. 611.

61. HIGHWAY—Negligence.—The owner of a cow which has been injured by falling into a trench dug for laying a gas pipe is not chargeable with contributory negligence in allowing the cow to run at large when he knew that the trench was being dug, where the city authorities allowed stock to run at large, and the trench would not have been dangerous had it not been left unguarded for two hours in the middle of the day, during which time the accident occurred.—*Noblesville Gas & Imp. Co. v. Teter*, Ind., 27 N. E. Rep. 635.

62. HIGHWAY—Surveyors.—When a public road has been laid out and recorded, though never opened, the court may, on proper application under the road act, appoint surveyors to vacate it, since Revision N. J. p. 996, § 8, makes a road a public highway from the time appointed for opening the same, and not the time it is actually opened.—*State v. Adams*, N. J., 21 Atl. Rep. 937.

63. INJUNCTION—Land owners.—Where a court at law has determined the legal rights of two adjoining landowners, under a reservation in the deed of the one to the other of the right to construct a building upon the common line between them, with windows therein overlooking the land conveyed, and he erects such building, and the grantee afterwards also erects a building upon the common line obstructing such windows so as to prevent the ingress of light and air, this court will not interfere.—*Hagerty v. Lee*, N. J., 21 Atl. Rep. 933.

64. INJUNCTION—Nuisance.—The apprehended fouling or pollution of a stream of water in the future by the sewage of a part of a city from sewers, which have been legally, scientifically, and properly constructed, but which has not yet taken place, and of which there is no immediate or imminent danger, and which depends

upon a contingency that may not happen, does not present a case for an injunction.—*City of Hutchinson v. Delano*, Kan., 26 Pac. Rep. 740.

65. INSURANCE—Waiver. —An insurance company accepted payment of the premium due, after notice that the conditions of the policy had been broken by reason of the building becoming vacant. Afterwards the insured requested the company to cancel the policy and return the unearned premium, but the company refused to do so: *Held*, that it had waived the forfeiture, and was liable for a loss afterwards occurring.—*Phœnix Ins. Co. v. Boyer*, Ind., 27 N. E. Rep. 628.

66. INSURANCE—Waiver—Receipt of Letter.—Where the receipt of a certain letter is a material issue in the case, and the party to whom it was addressed denies having received it, it is reversible error to instruct the jury that evidence of the mailing of the letter, properly addressed and stamped, is *prima facie* proof of its receipt by the person to whom it was addressed.—*Home Ins. Co. v. Marple*, Ind , 27 N. E. Rep. 633.

67. INTOXICATING LIQUORS—Information.—Under the provisions of section 11, ch. 50, Comp. St., each act of selling any of the liquors named in the section, as well as the act of giving away any of them, without a license to do so is a crime.—*Smith v. State*, Neb., 48 N. W. Rep. 823.

68. INTOXICATING LIQUORS—Transporting through Indian Country.—Transporting ardent spirits as an article of commerce through an Indian country between places outside the same, is not a violation of Rev. St. U. S. § 2139, which provides that "no ardent spirits shall be introduced, under any pretense, into the Indian country."—*United States v. Twenty-nine Gallons of Whisky, etc.*, U. S. D. C. (Mont.), 45 Fed. Rep. 847.

69. JUDGMENT—Pleading.—In an action to set aside a judgment by default against husband and wife, a complaint showing that the wife had a defense which an attorney was retained to present, but that the case was called for trial and judgment rendered without the knowledge of such attorney of his clients, is bad on demurrer, where it fails to allege any excuse for the attorney's negligence.—*Parker v. Indianapolis Nat. Bank*, Ind., 27 N. E. Rep. 650.

70. JUDGMENT—Revival.—A proceeding to have execution issued on a judgment after the the lapse of more than 10 years, being in the nature of a *scire facies* to revive the judgment, should be had in the court in which the judgment was rendered regardless of the residence of the judgment debtors.—*Conner v. Neff*, Ind., 27 N. E. Rep. 645.

71. LANDLORD AND TENANT.—A landlord is not liable to one T for the value of cotton levied on and sold under a distress warrant for rent, which cotton the tenant had assigned to R being a part of the crop, in payment of his wages, subject to the rent claims.—*Sansing v. Risinger*, Tex., 16 S. W. Rep. 249.

72. LANDLORD AND TENANT—Lease.—A lessor of land agreed to buy a house, to be erected thereon by the lessee, at the expiration of the five years' lease, provided the lease was not then renewed. Before the expiration thereof he signed an agreement whereby it was continued, "with all its conditions unchanged and unimpaired," for a year: *Held*, that the lessee, by accepting such agreement and remaining a year, abandoned her right to exact payment for the house.—*Kash v. Huncheon*, Ind., 27 N. E. Rep. 645.

73. LANDLORD AND TENANT.—Where the lessor agreed to clear a portion of the land and render it fit for cultivation, but fails to do so, the lessee is not bound to clear it, and then look to the lessor to be reimbursed for its cost, but he may recoup the difference between the rental value cleared and uncleared.—*McCoy v. Oldham*, Ind., 27 N. E. Rep. 647.

74. LIBEL—Abatement.—Under section 2967 of the Code as amended by the act of 1889, an action for libel, pending at the time the act passed, does not abate upon the death of the plaintiff.—*Johnson v. Bradstreet Co.*, Ga., 13 S. E. Rep. 250.

75. LOGGERS' LIENS—On a petition to enforce a lien on logs in favor of plaintiffs for their labor in driving them the checks, account books, and time-book of the contractors for whom plaintiffs worked, and who are strangers in respect to the lien, are incompetent.—*Clinton v. Underwood Lumber Co.*, Wis., 48 N. W. Rep. 856.

76. LOST INSTRUMENTS — Indemnifying Bond.—In an action on a lost certificate of deposit, the court, before entering judgment, may require plaintiff to give an indemnifying bond.—*Schmidt v. People's Nat. Bank*, Mass., 27 N. E. Rep. 595.

77. MALICIOUS PROSECUTION — Search-warrant. — An action for damages will lie for maliciously and without probable cause procuring the issuance and execution of a search-warrant for goods alleged to have been stolen.—*Olson v. Tvete*, Minn., 48 N. W. Rep. 614.

78. MASTER AND SERVANT—Action for Wages.—In an action to recover for six months' work the complaint contained two counts, the first alleging a contract to work for a year at a fixed price per month, and the other claiming the reasonable value of the work: *Held*, that it was error for the court to compute the value of the services as though there was no contract, and then to deduct damages therefrom as though a contract had been made and broken by plaintiffs.—*Feith v. Johnson*, Conn., 21 Atl. Rep. 923.

79. MASTER AND SERVANT—Contributory Negligence.—Plaintiff was put to work on a platform on defendant's ice-house, and warned not to go on a certain part, which was not railed, because of the danger of slipping on the ice and falling off. He disregarded the warning, and was knocked to the ground, and injured by bricks falling from the building above him, through defendant's negligence. He knew nothing of the defect in the building: *Held*, that plaintiff's negligence was not the proximate cause of his injury, and cannot defeat his recovery.—*Smithwick v. Hall & Upson Co.*, Conn., 21 Atl. Rep. 924.

80. MECHANIC'S LIEN—Homestead.—The homestead is subject to sale on a mechanic's lien duly obtained.—*Phelps Biglow Windmill Co. v. Stay*, Neb., 48 N. W. Rep. 896.

81. MECHANIC'S LIENS—Parties.—In an action to foreclose a mechanic's lien, all lienholders and incumbrancers should be made parties, and a lienholder who is not made a party in the first instance is entitled, upon application, to come in at any time before final judgment, and, by an answer in the nature of a cross-petition, set forth his claim of lien, and ask to have the same foreclosed.—*Johnson v. Keeler*, Kan., 26 Pac. Rep. 728.

82. MORTGAGE — Adverse Possession. — Where the grantor in a deed of trust continues to reside on the land with his wife after trustee's sale, it will be presumed that he, and not his wife, is the party in possession, even though he had previously conveyed to her his equity of redemption.—*Meier v. Meier*, Mo., 16 S. W. Rep. 223.

83. MORTGAGE—Guaranty.—An assignment of a mortgage providing, "and we do hereby guaranty the collection of said mortgage and all payments thereon at maturity," makes the assignors guarantors of the whole debt, though there was no bond accompanying the mortgage, and the mortgagor was not liable beyond the mortgage.—*Waters v. Chase*, Penn., 21 Atl. Rep. 882.

84. MORTGAGE—Note.—The note or debt is the principal thing, and the mortgage a mere incident, and the party to whom the note or debt is transferred becomes thereby the owner of the security, and, on being paid the note or debt, he may be required to acknowledge satisfaction of the mortgage, and it is his duty, if need be, to provide himself with authority to satisfy the mortgage of record.—*Daniels v. Densmore*, Neb., 48 N. W. Rep. 906.

85. MORTGAGE—Payment of Taxes.— When the payment of taxes assessed on real estate is necessary to protect his security, a mortgagee may pay the same, and have the amount added to the mortgage principal, as necessary expenses incurred in protecting the security. Southard v. Dorrington, 10 Neb. 110, 4 N. W. Rep. 935, and authorities there cited.—*Townsend v. J. I. Case Threshing Machine Co.*, Neb., 48 N. W. Rep. 899.

86. MORTGAGE FORECLOSURE.—Where land is bought by a father, and the first payment is made by him, with his own money, and purchase-money mortgage given for the balance in his name, a statement, inserted in the deed to him, after the description, that the land is deeded to him, in trust for his minor son, will not vest the latter with the legal title so as to enable him to contest the foreclosure of such mortgage.—*Strong v. Ehle*, Mich., 48 N. W. Rep. 868.

87. MUNICIPAL CORPORATIONS—Erection of City Hall.—The expediency and wisdom of purchasing a site and constructing a city hall are to be determined by the mayor and council, and as a general rule the courts cannot interfere wiht their discretion either in the selection of the site or the time when such a building shall be erected.—*City of Argentine v. State*, Kan., 26 Pac. Rep. 751.

88. MUNICIPAL CORPORATIONS— Personal Injuries.—It is negligence for a city knowingly to allow a hole three by four feet across, and from four to six feet deep opening into a sewer, to remain in one of its streets near the sidewalk, with no railings, light, or other warning to travelers.—*Mayor v. Lewis*, Ala., 9 South. Rep. 243.

89. NATIONAL BANKS—Usury.—The courts of record of the State have jurisdiction in actions brought under §§ 5197 and 5198 of the Revised Statutes of the United States to recover from national banks the penalty for knowingly taking, receiving, reserving or charging a greater rate of interest than is allowed by law.—*Schuyler Nat. Bank v. Bollong*, Neb., 48 N. W. Rep. 826.

90. NEGOTIABLE INSTRUMENT—Assignee.—Any defense good as against the original owner of a non-negotiable note is good against the transferee or assignee.—*Stebbins v. Lardner*, S. Dak. 48 N. W. Rep. 847.

91. NEGOTIABLE INSTRUMENT —Corporations.—Where one doing business alone under the firm name of "Branch, Crookes & Co.," after borrowing money on the credit of both that and his own name, organizes a corporation called the "Branch-Crookes Saw Co.," and transfers all his assets to it, the presumption is strong that the corporation assumed the debt.—*Bremen Sav. Bank v. Branch-Crookes Saw Co.*, Mo., 16 S. W. Rep. 209.

92. NEGOTIABLE INSTRUMENT—Parol Evidence.—Where in an action on a note it appeared that said note was given in consideration of the balance due upon a prior note, such prior note being collateral to and described in a written agreement on the part of plaintiff to sell defendant certain property therein, and compliance therewith to be deemed full consideration for the note therein set out, oral evidence is inadmissible to show that certain land warrants, not specified in said agreement, formed part of the consideration of the note in suit.—*Langan v. Langan*, Cal., 26 Pac. Rep. 764.

93. NEGLIGENCE—Collision on Highway.—In an action for the death of plaintiff's horse, caused by collision with defendant's team on a highway, while going in opposite directions, a complaint alleging that defendant's horse was unbroken, and subject to unmanageable starts, and that when opposite plaintiff's team defendant negligently permitted him to cross the highway and collide with plaintiff's horse, does not entitle plaintiff to recover treble damages under Gen. St. Conn. §§ 2689, 2690.—*Broschart v. Tuttle*, Conn., 21 Atl. Rep. 926.

94. NEGLIGENCE—Evidence — Repairs. — In an action for personal injuries occasioned by plaintiff's being caught between the rails between which the blocking was insufficient while attempting to uncouple moving cars, evidence that the day after the accident a new and sufficient block was placed between the rails at that point is inadmissible.—*Alcorn v. Chicago & A. Ry. Co.* Mo., 16 S. W. Rep. 229.

95. NEGLIGENCE—Vicious Animal.—Instructions as to a vicious and dangerous animal stated too broadly to be applicable to the testimony.—*Durrell v. Johnson*, Neb., 48 N. W. Rep. 890.

96. NUISANCE—Injunction.—The owner of a building, who occupied it as a store, cannot enjoin the erection of bay-windows on an adjoining building, extending 18 to 20 inches into the street: the damage which may result from the obstruction of the view being too remote and speculative to constitute the basis of a private action.—*Hay v. Weber*, Wis., 48 N. W. Rep. 859.

97. OPENING STREETS.—Where a petition for opening and grading a portion of a street is presented to the mayor and city council of a city of the first class, under the proviso to section 4 of chapter 99 of the Laws of 1887, and all the necessary steps are taken to have said street opened and graded, the mayor and city council may assess and apportion the cost of such improvement against the lots and parcels of land abutting on the improved portion of said street, and said assessment may be made on each block separately, as a taxing district.—*Simpson v. City of Kansas City*, Kan., 26 Pac. Rep. 721.

98. PARENT AND CHILD—Custody of Infant.—A person to whom a mother has committed the custody and care of her child, to raise and educate as the former's own child, the child having no father, is entitled to such custody as against a mere stranger having no legal right thereto; and the right of the former to the custody will be enforced if she is a proper person to have it.—*Jones v. Harmon*, Fla , 9 South. Rep. 245.

99. PARENT AND CHILD—Liability for Services.—Where a child remains with one standing *in loco parentis*, after having reached the age of majority, in the same apparent relation as when a minor, the presumption is that the parties do not contemplate payment of wages for services rendered; but, where there was an agreement to pay the child a certain amount on her marriage, a recovery may be had therefor.—*Stock v. Stoltz*, Ill., 27 N. E. Rep. 604.

100. PAYMENT — Presumption. — The presumption of payment arising from a receipt in a deed, and from subsequent releases, may be rebutted by the testimony of disinterested and credible witnesses as to subsequent statements to them by the grantee of his indebtedness to the grantors; and on such testimony bonds of the grantee to such grantors, which the will of the former acknowledging the indebtedness directed to be delivered at his death, may be sustained.—*In re Eshleman's Estate*, Penn., 21 Atl. Rep. 905.

101. PLEADING—Abatement.—A judgment was obtained in the State of New York upon certain notes. A new action was afterwards begun in this State upon the same notes. Later an action between the same parties was begun in this State upon the New York judgment: *Held*, that a plea in abatement filed in the last action, setting up the pendency of the action upon the notes, was bad as the respective causes of action were not the same.—*Steers v. Shaw*, N. J., 21 Atl. Rep. 940.

102. PLEADING—Contract.—A declaration or complaint by a government contractor against his subcontractor for dredging, alleging damages to plaintiff's channel revetment, caused by defendant's not dumping the excavated material against this revetment, as agreed, is a suit for breach of contract, and not on the case.—*Junker v. Fobes*, U. S. C. C. (Ala.), 45 Fed. Rep. 840.

103. PRINCIPAL AND AGENT.—A principal cannot avail himself of the unauthorized act of his agent, so far as it is advantageous to him, and repudiate its obligation.—*Wyckoff v. Johnson*, S. Dak., 48 N. W. Rep. 837.

104. QUIETING TITLE — Incorporeal Hereditaments.—The statute of 1870, giving the court of chancery jurisdiction to settle the title to lands in certain cases, does not give authority to settle the title to an incorporea

hereditament claimed by the complainant to exist in lands held in possession by the defendant.—*Whitlock v. Greacen*, N. J., 21 Atl., Rep. 944.

105. QUIETING TITLE—Pleading.-In an action to remove a cloud upon a title, under a petition setting out all the facts, similar to a bill in equity, and independent of statutory regulations, it is not necessary to allege that the plaintiff was in possession of the premises.—*Grove v. Jennings*, Kan., 26 Pac. Rep. 738.

106. RAILROAD AID BONDS — Injunction. — A much stronger case is required to enjoin the collection of taxes levied for the payment of interest or principal of bonds issued in pursuance of apparent authority, and which have been duly registered and passed into the hands of *bona fide* purchasers, than to prevent the issuing of such bonds and specified grounds, which might invalidate them.—*Cook v. City of Beatrice*, Neb., 48 N. W. Rep. 828.

107. RAILROAD COMPANIES — Crossing — Contributory Negligence.—In an action to recover for the killing of the plaintiff's intestate by a railway train while he was walking across the track at a street crossing, *held*, that the evidence showed contributory negligence, in that he either failed to look or listen for an approaching train, or, if he saw it in attempting needlessly to cross the track ahead of it.—*Carney v. Chicago, St. P., M. & O. Ry. Co.*, Minn., 48 N. W. Rep. 912.

108. RAILROAD COMPANIES—Negligence of Parents.—Parents in permitting children of tender years to wander where they may get upon a railroad track, are guilty of such negligence as will prevent them from recovering for their death through the railroad company's negligence. — *Westerberg v. Kinzua Creek & K. R. Co.*, Penn., 21 Atl. Rep. 878.

109. REAL ESTATE AGENT—Purchase by Agent.—Where an agent to sell property becomes the purchaser in fact at a sale made by himself, the sale is *prima facie* voidable by the principal, and to sustain it the agent must prove the facts that make it valid, as that with full knowledge of its character and of all the facts the principal consented to it.—*Tilleny v. Wolverton*, Minn., 48 N. W. Rep. 908.

110. REPLEVIN—Tender.—A plaintiff in replevin, after a judgment had been reversed by the supreme court for want of payment of the price of the property, paid the money into court without paying costs up to that time, the defendant took out the money, and the cause was submitted to the judge without a jury: *Held*, that the plaintiff was liable for all the costs, since his payment into court was equivalent to a plea of tender.—*Summerson v. Hicks*, Penn., 21 Atl. Rep. 875.

111. SUBROGATION—Assignment of Judgment.—A judgment debtor whose land had been sold in part satisfaction of the judgment requested a third person to give his note to the judgment creditor, and obtain from him an assignment of the judgment and the certificate of sale. This was done, and the note was duly paid by the maker: *Held*, that he thereby became subrogated to all the rights of the judgment creditor, and was also entitled to judgment against the judgment debtor for the difference between the amount due him and the value of the land.—*Shattuck v. Cox*, Ind., 27 N. E. Rep. 609.

112. TAXES—Injunction.—An injunction will not lie to prevent the collection of taxes, a portion of which are legally assessed, without an allegation in the complaint that complainant has paid the amount legally due, or that, in addition to having tendered the amount to the collector, he keeps the tender good by bringing the amount into court.—*Hewett v. Fenstamaker*, Ind., 27 N. E. Rep. 621.

113. TRESPASS—Burden of Proof.—When a party cuts down a fence on the lands of another, and afterwards attempts to justify the act on the ground that the fence is within a public road, he must prove by a preponderance of the evidence that the fence at that point was within the limits of a legally established public highway.—*Shafer v. Stull*, Neb., 48 N. W. Rep. 882.

114. TRESPASS — Right to Crops. — Defendants purchased at sheriff's sale land of which plaintiffs were in possession, and never turned them out. Plaintiffs thereafter planted a crop of corn, and when it was ripe defendants came and carried away half of it: *Held*, that plaintiffs had a right to recover the value of the corn so taken.—*Potter v. Lambie*, Penn., 21 Atl. Rep. 888.

115. TRIAL—Burden of Proof.—When at the trial a party voluntarily assumes the burden of proof, it is not cause for the reversal by this court of a judgment rendered against him that the burden of proof was cast by the pleadings on the other party.—*Parker v. Nicholson*, Kan., 26 Pac. Rep. 729.

116. TRIAL—Demurrer to Evidence. — In case of a demurrer to plaintiff's evidence the court cannot weigh conflicting testimony, but must view that which is given in the light most favorable to the plaintiff, and allow all reasonable inferences in his favor, and unless all that is offered fails to establish his case or some material fact in issue in the case, the demurrer should be overruled.—*Rogers v. Hodgson*, Kan., 26 Pac. Rep. 732.

117. TRIAL—Expert Witness.—Though the court may, in its discretion, allow the opposing party to cross-examine an expert witness as to his qualifications before permitting him to give his opinion, such preliminary cross-examination is not a matter of right.—*Finch v. Chicago, M. & St. P. Ry. Co.*, Minn., 48 N. W. Rep. 916.

118. TRIAL—Instructions. — A judgment will not be reversed for the refusal on the part of the trial court to give a certain instruction, unless the law of such instruction is applicable to the evidence in the case.—*Bell v. City of York*, Neb., 48 N. W. Rep. 878.

119. TRIAL—Juror.—Where a juror states on his *voir dire* that he has not formed or expressed any opinion on the merits of the cause, when in fact he served as juror in another cause in which the same issue was involved, such misconduct is sufficient ground for a new trial, when the fact of such juror having served in the other cause was not known to the defeated party.—*Johnson v. Tyler*, Ind., 27 N. E. Rep. 643.

120. TRIAL—Presumptions on Second Trial.—Where a verdict is set aside and a new trial granted, the second trial is to be conducted in precisely the same manner as if no trial had previously taken place. The fact that a verdict had previously been rendered in favor of the plaintiff does not raise any presumption against the defendants which can be considered by the jury or court in the second trial.—*Earle v. Reid*, Neb , 48 N. W. Rep. 894.

121. TRIAL BY COURT—Findings.—When an action at law is tried to a court without a jury, the finding of fact by such court is a substitute for and stands in lieu of a verdict of a jury, and need be no more specific than the verdict of a jury upon the same pleadings and evidence.—*Rhodes v. Thomas*, Neb., 48 N. W. Rep. 886.

122. WATER RIGHTS—Irrigation.—The facts that a party has changed the head of a ditch to a point higher up stream, or that he built a ditch in which to carry the water of a former appropriation, do not affect his right to such water.—*Greer v. Heiser*, Colo., 26 Pac. Rep. 720.

123. WATERS — Surface Water.— Defendant's land, a part of which was swamp, adjoined plaintiff's. Defendant dug a ditch, which drained the water from the swamp onto the land of plaintiff, rendering it unproductive. *Held*, in an action for damages, that the fact that the digging of the ditch was good husbandry, and improved defendant's land, was no defense.—*Yerex v. Kineder*, Mich., 48 N. W. Rep. 875.

124. WATERS—Damages.—A person who has entered into a contract obligating himself to drive logs down a stream navigable for such purposes, knowing that the stream had been and was unlawfully obstructed, and who is hindered and subjected to expense, in performing his undertaking, by reason of such impediments, is not entitled to maintain a private action for damages against the person creating such obstructions in the highway.—*Brennan v. Lammers*, Minn., 48 N. W. Rep. 766